89-805

No.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1989

AMERICAN INTERNATIONAL CONTRACTORS, INC.,
Petitioner,

v.

THE PROCTER & GAMBLE COMPANY, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether respondents' complaint alleges a "pattern of racketeering activity" under RICO, 18 U.S.C. sections 1961-1968.

2. Whether the "pattern of racketeering activity" component of RICO, as applied to petitioner through the allegations in respondents' complaint, is sufficiently definite to meet due process standards required of criminal statutes under the fourteenth amendment.

PARTIES TO THE PROCEEDING

The petitioner is American International Contractors, Inc. The respondents are The Procter & Gamble Company and Riverview Productions, Inc. Parties to the proceedings below are Big Apple Industrial Buildings, Inc., Arol I. Buntzman, Martin William Halbfinger, The Arkhorn Corporation, Haines Lundberg Waehler and John Does 1-10.*

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* This petition was originally filed by The George A. Fuller Company, as petitioner. Fuller has changed its name to American International Contractors, Inc. All references to Fuller herein are references to petitioner, American International Contractors, Inc. In compliance with Supreme Court Rule 28.1, petitioner makes the following additional disclosure. Petitioner is a subsidiary of AIC Group, Inc. Corporations affiliated with petitioner are AIC Middle East, Inc., AIC Midwest, Inc., Southwest AIC, Inc., AIC West, Inc. and Delphcon Builders, Inc.

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George A. Fuller Company petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, *infra*, A-1 through A-16) is reported at 879 F.2d 10 (2d Cir. 1989). The opinion of the district court (App. B, *infra*, A-17 through A-24) is reported at 655 F. Supp. 1179 (S.D.N.Y. 1987).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1) (1987). The judgment of the court of appeals was entered on June 22, 1989 and its mandate was issued on August 9, 1989. App. A, *infra*, at A-1. On July 31, 1989, the court of appeals denied a timely Petition for Rehearing filed by parties other than petitioner. App. C, *infra*, at A-25. This Petition is timely, having been filed within ninety days of that date. Sup. Ct. R. 20.4.

STATUTES INVOLVED

The statutes involved in this case are reproduced as Appendix D, *infra*, at A-26 through A-28.

STATEMENT UNDER SUPREME COURT RULE 28.4(b)

Since this proceeding draws into question the constitutionality of an Act of Congress affecting the public interest (*i.e.*, 18 U.S.C. §§ 1961(5), 1962), and neither the United States nor any agency, employee or officer thereof is a party, it is noted that 28 U.S.C. section 2403(a) may be applicable.

No court of the United States as defined in 28 U.S.C. section 451 has, pursuant to 28 U.S.C. section 2403(a), certified to the Attorney General the fact that the constitutionality of such Act of Congress has been drawn into question. *See infra*, at 12-13.

STATEMENT OF THE CASE

This Petition requires the Court to address again the interpretation of the "pattern of racketeering activity" component of The Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968, Pub. L. No. 91-452, 84 Stat. 941, *as amended*, 18 U.S.C. §§ 1961-1968 (1982 ed. & Supp. V 1987). RICO's pattern component, which the Court recently considered in *H.J., Inc. v. Northwestern Bell Telephone Company*, ____ U.S. ____, 109 S. Ct. 2893 (1989) (*"HJ"*), is defined in section 1961(5) of title 18, United States Code, and is the common element of each of RICO's substantive liability provisions. 18 U.S.C. § 1962. (1982 ed. & Supp. V 1987). This case also requires the Court to determine the constitutionality of the pattern component of RICO as against petitioner's due process challenge based on vagueness principles.

A. Factual Background

This case arises out of a construction project.[1]

In 1983 respondent The Procter & Gamble Company ("P&G"), was looking for a studio facility to produce its soap opera television programs. P&G ultimately settled on an abandoned factory owned by Big Apple. Big Apple and its president, Arol I. Buntzman ("Buntzman"), approached P&G with a plan to convert the factory into a television production facility. In January 1985, after a period of negotiations, respondent Riverview Productions, Inc. ("Riverview"), an entity which had been formed to act on behalf of P&G in the studio project and whose obligations P&G guaranteed, entered into a ten-year lease and lease-guaranty with Big Apple which contemplated construction of the studio facility. Petitioner Fuller, a legitimate construction company with a respected hundred year reputation, was to serve as a construction manager for the project.

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[1]The facts relevant to this Petition are set forth in detail in the opinion of the court of appeal, *Procter & Gamble v. Big Apple Industrial Buildings, Inc.* (App. A, *infra*, at A-2 through A-5) and in the opinion of the district court. App. B, *infra*, at A-17 through A-18.

On May 2, 1986 respondents filed a complaint (App. E, *infra*, A-29 through A-78) asserting pendent state law claims for fraud and conversion, as well as claims against petitioner, Big Apple, Big Apple's attorney Martin William Halbfinger ("Halbfinger") and Buntzman based upon RICO. The gravamen of the complaint is that Big Apple, Halbfinger and Buntzman fraudulently induced respondents to lease the studio complex and to guarantee construction financing for the project by misrepresenting that Big Apple possessed sufficient experience to build a television production facility and by exaggerating the tourist attraction potential of the completed facility. *See* App. A, *infra*, at A-3.

Respondents' complaint pleads a limited role on the part of petitioner in assisting this alleged scheme.[2] Petitioner is alleged to have made an inaccurate initial estimate of construction costs. That estimate was then allegedly used by Big Apple to induce respondents to undertake the project. The complaint further alleges that during construction petitioner and the other RICO defendants illegally requisitioned and diverted project funds for improper purposes, that Big Apple submitted excessive requisitions for funds, and that Big Apple and its attorney Halbfinger abused project escrow accounts by inflating requisitions to provide a cash "cushion" in case respondents detected the alleged fraud. App. A, *infra*, at A-5. The complaint also alleges that petitioner later provided a revised estimate to the other RICO defendants, which disclosed increased construction costs, which Big Apple also allegedly chose to conceal from respondents. Finally, respondents allege that they were induced to pay "interim rent" prior to completion of the project because petitioner and the other RICO defendants falsely blamed P&G and Riverview for construction delays. *Id.*

At best, the complaint pleads a secondary role by petitioner in an alleged fraudulent scheme arising out of a single construction project. As pointed out by the district court, respondents' allega-

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[2] The allegations which refer to petitioner are found in paragraphs 2-4, 9, 19, 27-28, 30-31, 34, 37-42, 44, 46, 48, 50, 52(iii), (iv), (vi-xi), (xiii), (xv), 54-57, 59, 60(viii), 62, 70-71, 76, 80, 82, 89, 91, 100, 103, 106, 110, 114, 118, 120-124, 135-136, 141 and 147-148 of respondents' complaint. App. E, *infra*, A-29 through A-78.

tions of cost overruns, overcharging and delay against petitioner, when reduced to essentials, are the standard fare of an ordinary construction dispute in which the project winds up costing more than originally estimated. App. B, *infra*, at A-20. Judge Leval noted that such allegations are as common to construction cases "as steel, bricks and mortar." *Id.*

On the basis of their RICO count, respondents pray for compensatory damages according to proof, "but in no event less than $100 million trebled pursuant to 18 U.S.C. § 1964(c)." *See* App. E, *infra*, at A-76 (Complaint ¶ 175(c)).

B. The Decisions Below

Petitioner filed a motion to dismiss respondents' complaint for failure to state a claim under RICO. The district court granted the motion on the ground that the complaint did not adequately allege a "pattern of racketeering activity" necessary to impose RICO liability under 18 U.S.C. section 1962(c) and (d). *See* App. B, *infra*, at A-22 through 24. In reviewing the allegations in respondents' complaint, the district court held that, "An undertaking by a contractor engaged in a lawful enterprise to bilk one customer in one construction project of finite duration and scope does not satisfy the 'continuity' element of the pattern of racketeering" [requirement]. *Id.* at A-21. As a result, the district court dismissed the complaint for lack of subject matter jurisdiction because the only basis for federal jurisdiction was respondents' RICO claim. *Id.*, at A-21, A-24. The district court's March 20, 1987 Judgment is reproduced as Appendix F, *infra*, at A-79.

In a 2-1 decision, the Second Circuit Court of Appeals reversed and remanded for further proceedings in the district court. The Second Circuit's disposition was based on its *en banc* opinion in *Beauford v. Helmsley*, 865 F.2d 1386 (2d Cir. 1989), which held that a sufficient pattern of racketeering activity is alleged if the complaint pleads "a basis from which it [can] be inferred that the acts of racketeering activity were neither isolated nor sporadic." *Id.* at 1391. Applying *Beauford*, the Second Circuit held as a matter of law that respondents' complaint alleged a "pattern of racketeering activity" sufficient to state a claim under 18 U.S.C.

section 1962(c) and (d). App. A, *infra*, at A-6 through A-7, A-13 through A-14. The Second Circuit then denied a timely Petition for Rehearing on July 31, 1989. App. C, *infra*, at A-25.

REASONS FOR GRANTING THE WRIT

The present Petition should be granted to achieve that which the Court did not accomplish in *H.J., Inc. v. Northwestern Bell Telephone Company*, ____ U.S. ____, 109 S. Ct. 2893 (1989) (*i.e.*, formulate a reliable definition of RICO's pattern component, capable of consistent application). To sustain a claim for relief under RICO, a plaintiff or prosecutor must plead and prove that a defendant engaged in a "pattern of racketeering activity." 18 U.S.C. § 1962 (a-d). The Court granted certiorari in *HJ* purportedly to resolve what conduct constitutes a "pattern of racketeering activity" under RICO. *Id.* ____ U.S. at ____ n.2, 109 S. Ct. at 2898 n.2. In *HJ*, however, the Court clearly did not succeed.

While *HJ* rejects the notion that RICO's pattern component requires a plaintiff to plead that a defendant had engaged in multiple fraudulent schemes, the Court's opinion provides little practical guidance to federal courts and litigants in applying the pattern requirement. Ironically, the principal result of the majority opinion in *HJ* is the creation of even greater confusion as to what constitutes a "pattern of racketeering activity." Moreover, at a time when another round of litigation is about to ensue in response to the Court's statement that development of the concepts underlying the "pattern" requirement "must await future cases" (*id.* ____ U.S. at ____, 109 S. Ct. at 2902), an ominous cloud has been cast over RICO's constitutionality by four Justices of this Court. *Id.* ____ U.S. at ____, 109 S. Ct. at 2908-2909 (Scalia, J., concurring).

The instant Petition should be granted because it provides the Court with an opportunity to orient the development of RICO's pattern requirement before the obliquity inherent in *HJ* is played out in years of resource consuming litigation. Moreover, the Petition should be granted to determine the constitutionality of RICO's pattern component as against petitioner's challenge that

it is void for vagueness under due process standards applicable to criminal statutes. The constitutional challenge, because it is meritorious, permits the Court to truncate yet another unnecessary round of pattern litigation.

I. CERTIORARI SHOULD BE GRANTED BECAUSE THE PROPER INTERPRETATION AND CONSTITUTIONALITY OF RICO'S "PATTERN OF RACKETEERING ACTIVITY" COMPONENT REMAIN UNSETTLED ISSUES OF NATIONAL IMPORTANCE EVEN AFTER THIS COURT'S DECISION IN *H.J. INC. v. NORTHWESTERN BELL TELEPHONE COMPANY*

The explosion of civil RICO litigation first noted by this Court four terms ago in *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 485-486, 499 n.16 (1985) ("*Sedima*"), continues unabated. P. Lacovara & G. Aronow, *The Legal Shakedown of Legitimate Business People: The Runaway Provisions of Private Civil Rico*, 21 New Eng. L. Rev. 1, 25-28 (1985-86) ("Lacovara & Aronow"). The breadth of uses to which civil RICO has been put and its "federalization" of broad areas of state law (*Sedima*, 473 U.S. at 501 [Marshall, J., dissenting]), demonstrates the continuing impact of civil RICO on pedestrian commercial activity in the United States. The widespread use of the statute confirms that the incremental approach chosen by the Court in *HJ* (*id.* ____ U.S. at ____, 109 S. Ct. at 2902) as the mechanism to further develop RICO's pattern requirement will spawn extensive litigation in the federal courts.

The Petition should be granted in large part because, unlike *HJ*, which involved allegations of inherently criminal conduct such as bribery, influence peddling and corruption by public officials, this case is an ordinary construction dispute arising out of a typical commercial transaction. In contrast to *HJ*, this case presents an opportunity for the Court to address the meaning of RICO's pattern component in the context of a case in which RICO is most likely to be abusively invoked: an ordinary business case. The present case also demonstrates the inability of the holding in *HJ* to yield a definition of the pattern requirement that is capable of consistent and coherent application. The common and recurring nature of the kinds of allegations made against

petitioner in respondents' complaint well-illustrate the ease with which ordinary commercial cases are bootstrapped into federal court through RICO.

The potential unconstitutionality of RICO's pattern component on vagueness grounds, as suggested by four Justices of this Court, is also ample indication of the national importance of resolving what conduct constitutes a "pattern of racketeering activity." The breadth of civil RICO litigation in state and federal courts and the criminal applications of the statute, make it intolerable and irrational as a matter of national policy to defer a constitutional ruling.

A. This Court's Decision In *HJ* Will Not Lead To The Development Of A More "Meaningful Concept" Of RICO's Pattern Requirement

In *Sedima* this Court suggested that the failure of Congress and the courts to develop a "meaningful concept" of a pattern was at the root of RICO's " 'extraordinary' " uses. *Id.* 473 U.S. at 500. Even in the post-*Sedima* period, "the courts have never agreed on what a pattern of racketeering activity consists of . . . ." D. Smith & T. Reed, *Civil Rico*, ¶ 4.01, at 4-1 (1987 ed.) ("Smith & Reed"). In the four terms since *Sedima* was decided, the federal courts (including this Court) have struggled and failed to meet the challenge to develop a reliable definition of RICO's pattern component. The Court's challenge, in fact, produced the "widest and most persistent circuit split on an issue of federal law in recent memory." *HJ*, ____ U.S. at ____, 109 S. Ct. at 2906-2907 (Scalia, J., concurring).

As an effort to clarify this cross-stitched patchwork of law, *HJ* fails. *HJ* compounds the flaw in the statutory definition set forth in 18 U.S.C. section 1961(5) by telling lower courts and litigants only what conduct *does not* constitute a pattern. *Id.* ____ U.S. at ____, 109 S. Ct. at 2906; *see also Garbade v. Great Divide Mining and Milling Corp.*, 831 F.2d 212, 214 (10th Cir. 1987). Because section 1961(5) states that a pattern " '*requires* at least two acts of racketeering activity,' " this Court had previously recognized that something more [than two predicate acts] is necessary to constitute a "pattern." *Sedima*, 473 U.S. at 496 n.14 (emphasis in

original). However, because *HJ* fails to define the pattern requirement in affirmative terms capable of consistent application, the "something more" required to state a RICO claim remains uncertain.

Aside from rejecting the view that multiple schemes are the "something more" required to show a pattern, *HJ* at best repromulgates the Court's earlier statements on the issue in *Sedima*. At worst, *HJ* introduces additional murkiness in the application of concepts that the Court itself recognizes as inherently uncertain (*id.* ___ U.S. at ___ n.3, 109 S. Ct. at 2901 n.3) and as potentially "unmanageable" due to vagueness in the view of others. *See, e.g., United States v. Campanale*, 518 F.2d 352, 364 (9th Cir. 1975), *cert. denied*, 423 U.S. 1050 (1976); *United States v. Weatherspoon*, 581 F.2d 595, 601 n.2 (7th Cir. 1978).

1. *HJ* Fails To Develop The Constituent Elements Of RICO's Pattern Component In A Manner Capable Of Consistent Application

Four terms after *Sedima*, the Court still can only "begin to delineate the [pattern] requirement." *HJ*, ___ U.S. at ___, 105 S. Ct. at 2901. The Court's "delineation" purports to build on its oft- cited reference in *Sedima* to RICO's legislative history (*id.* at 496 n.14), that it is "*continuity plus relationship* which combines to produce a pattern." *HJ*, ___ U.S. at ___, 109 S. Ct. at 2900 (emphasis in original). Rehashing its earlier advice in *Sedima*, which led to the "most pervasive circuit split ... in recent memory," the Court in *HJ* states that a pattern is shown if "the racketeering predicate acts are related, *and* that they amount to or pose a threat of continued criminal activity." *Id.* ___ U.S. at ___, 109 S. Ct. at 2900 (emphasis in original). How this statement enhances the practical application of "continuity plus relationship" to real cases is simply unclear.

The Court proceeds to even greater levels of generality in its discussion of the constituent elements of "relationship" and "continuity" which combine to produce a pattern. The Court first addresses the "relationship" element of the pattern component by quoting from the definition of "pattern" found in 18 U.S.C. section 3575(e):

> [C]riminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission or are otherwise interrelated by distinguishing characteristics and are not isolated events.

18 U.S.C. § 3575(e) (repealed 1986 [Pub. L. No. 98-473, Tit. II, c. II, § 212(a)(2)], 98 Stat. 1987).

Notwithstanding the fact that the definition in section 3575(e) was expressly made non-applicable to RICO by Congress (*HJ.* ____ U.S. at ____, 109 S. Ct. at 2907) (Scalia, J., concurring), the Court's quotation amounts to little more than telling the lower courts to look for a "pattern." *Id.* This gloss is the sum of the Court's assistance on the "relationship" element of the pattern component.

The Court next addresses the "continuity" element. After observing that "There is no obviously "correct" level of generality . . . to use in describing the criminal activity alleged in RICO litigation" (*id.* ____ U.S. at ____ n.3, 109 S. Ct. at 2901 n.3), and stating that "What a plaintiff . . . must prove is continuity of racketeering activity, or its threat, *simpliciter*" (*id.* [emphasis in original]), the Court admonishes that continuity is primarily a "temporal concept" and that Congress was concerned with "long-term criminal conduct" in enacting RICO. *Id.* ____ U.S. at ____, 109 S. Ct. at 2902. As if it were adding precision to these generalized statements, the Court says that predicate racketeering acts extending "over a few weeks or months" do not satisfy the continuity requirement. *Id.* The Court anchors its description of the continuity element with the equally general conclusion that a "threat of continuity" can be proven by showing that "the predicate acts or offenses are . . . an . . . entity's regular way of doing business." *Id.* In a telling admission, the Court acknowledges that even its rambling discussion of the continuity element still makes it impossible to fix in advance whether a "pattern of racketeering activity" is present in any given case. *Id.*

2. The Post-*Sedima* Experience Discredits The Court's Incremental Approach As A Way To Achieve A Consistent Definition Of RICO's Pattern Component

Seemingly aware of its own inability to locate the limits of RICO's pattern component, the Court announces that: "The development of these concepts must await future cases." *HJ*, ___ U.S. at ___, 109 S. Ct. at 2902. This approach completely ignores the failure of incrementally developed post-*Sedima* case law to produce a more "meaningful concept" of the pattern requirement. The Court's formulation of "continuity" as both a "closed-and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition" (*id.*), is an invitation to repeat the divergent development of pattern case law that occurred in the years between *Sedima* and *HJ*.

Unlike the judicial experience in applying other factually intensive standards, the post-*Sedima* experience proves that a case-by-case elaboration of RICO's pattern requirement envisioned in *HJ* will not produce consistent results. *HJ*, ___ U.S. at ___ n.2, 109 S. Ct. at 2898 n.2. Unfortunately, the lack of clear guidance in *HJ*, ensures that the development of RICO's pattern component will continue through a "I know it when I see it" style of discourse. *Papai v. Cremosnik*, 635 F. Supp. 1402, 1410 (N.D. Ill. 1986).[3]

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[3] A consistent definition of RICO's pattern component will remain elusive as long as *Sedima* remains an interpretative cornerstone in the incremental process. On the one hand *Sedima* implores the lower courts to develop a "meaningful concept" of the pattern requirement and reminds that the statute is to be construed broadly. *Id.* at 496 n.14. On the other hand, *Sedima* counsels that the courts should not rewrite RICO, and that the breadth of its uses, if a defect at all, is for Congress to correct. *Id.* at 524. This internal tension, if not an outright contradiction within *Sedima*, may well frustrate any attempt in the lower courts to reach a consistent definition of RICO's pattern component. Smith & Reed, *supra*, ¶ 4.02, 4-9, 4-10. *HJ* makes no effort to remedy this confusing mixed-message in *Sedima*.

The highly elastic discussion of relationship and continuity in *HJ* make the application of RICO's pattern requirement even more uncertain and vague. Justice Scalia sensibly warns that:

> There is no reason to believe that the Courts of Appeals will be any more unified in the future [after *HJ*], than they have in the past, regarding the content of this law.

Id., ____ U.S. at ____, 109 S. Ct. at 2908 (Scalia, J., concurring). Under such circumstances, it is inconceivable that the lower courts will be better able to fashion a "coherent definition" of the pattern requirement which is "essential to the rational development of RICO law." *See Medallion Television Enterprises, Inc. v. SelecTV of California, Inc.*, 833 F.2d 1360, 1363 (9th Cir. 1987). By granting the instant Petition, the Court can at least direct the development of the case law if it speaks up now with the authoritative voice that was lacking in *HJ*.

B. RICO's Pattern Component Is Unconstitutionally Vague As Applied To Petitioner In Violation Of Due Process Principles Which Govern Criminal Statutes

RICO's pattern component is unconstitutional as applied to petitioner under the due process clause of the fourteenth amendment because a person potentially subject to RICO liability, whether criminal or civil, cannot determine in advance what conduct is proscribed under section 1962. *Coates v. City of Cincinnati*, 402 U.S. 611, 615 (1971). Petitioner's extremely limited role in the singular fraudulent scheme alleged in respondents' complaint (App. A, *infra*, at A-3 through A-4), well-illustrates the almost impossible task facing a legitimate business like petitioner, engaged in an ordinary construction project, to determine whether its actions might give rise to RICO liability and the chilling "racketeer" label.[4]

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[4] Irrespective of the meaning of RICO's pattern component, it is obvious that the civil remedy provided in 18 U.S.C. section 1964(c) is now being used almost exclusively against legitimate business entities like petitioner. Lacovara & Aronow, *supra*, at 13-15 n. 94. The extortive impact of even mere allegations of "racketeering" against an entity like petitioner engaged in ordinary commercial activity demonstrates the

Because RICO has criminal applications, due process demands that the statute meet the degree of certainty required of criminal laws even in its civil uses. *Giacco v. Pennsylvania*, 382 U.S. 399, 402-403 (1966); *F.C.C. v. American Broadcasting Co.*, 347 U.S. 284, 296 (1954); *see also* Note, *Civil RICO Is A Misnomer: The Need For Criminal Procedural Protections In Actions Under 18 U.S.C. § 1964*, 100 Harv. L. Rev. 1288 (1987). Because of RICO's broad use in private litigation and its harsh criminal sanctions, "clarity and predictability" in even its civil applications is of compelling national importance. *HJ.*, ___ U.S. at ___, 109 S. Ct. at 2909 (Scalia, J., concurring).

1. Because Of The Importance Of The Issue, And The Likely Unconstitutionality Of RICO's Pattern Component, The Court Should Reach The Issue Despite The Fact That It Was Not Raised Below

The constitutionality of RICO's pattern component was not raised in proceedings before the district court or the court of appeals. While petitioner is mindful that the Court is reluctant to reach issues raised for the first time in a petition for certiorari (*Youakim v. Miller*, 425 U.S. 231, 234 (1976)), there are compelling reasons to address the constitutionality of RICO's pattern requirement in this instance. In cases of sufficient national importance which raise pure issues of law, the Court has resolved issues raised for the first time in the petition for certiorari. *Nixon v. Fitzgerald*, 457 U.S. 731, 743, 745 n.23 (1982); *Mitchell v. Forsyth*, 472 U.S. 511 (1985). This is such a case.

The national importance of the constitutional issue is beyond serious question. *HJ.*, ___ U.S. at ___, 109 S. Ct. at 2908-2909 (Scalia, J., concurring). In addition, the present Petition raises only a pure issue of law regarding the construction and application of a federal statute and whether respondents' complaint states a claim under that statute. *Leidholdt v. L.F.P. Inc.*, 860 F.2d 890 (9th Cir. 1988), *cert. denied*, ___ U.S. ___, 109 S. Ct. 1532 (1989); 5 C. Wright, A. Miller and M. Kane, *Federal Practice and Procedure* § 1357, at 406-407 (Supp. 1989). Because the

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need to better define RICO's pattern component. *Sedima*, 473 U.S. at 504 (Marshall, J., dissenting).

Court must only determine whether RICO's pattern requirement can be applied to petitioner constitutionally on the basis of the allegations made in respondents' complaint, petitioner's vagueness challenge may be resolved now.

2. The Inability Of This And Other Federal Courts To Fashion A Consistent And Reliable Definition Of RICO's Pattern Component Demonstrates That It Is Void For Vagueness In Violation Of Due Process Principles

The inability to arrive at a consistent definition of RICO's pattern requirement has been a recurring topic in this Court. The Court recently acknowledged the "uncertainty inherent in RICO's pattern component." *HJ*, ____ U.S. at ____ n.3, 109 S. Ct. at 2901 n.3. Four terms ago, Justice Powell prophetically warned that the majority in *Sedima* had read RICO in such a way that it would be "difficult, if not impossible, for courts to adopt a reading of [RICO's] 'pattern' [requirement] that will conform to the intention of Congress." *Sedima*, 473 U.S. at 528 (Powell, J., dissenting).

RICO's pattern requirement suffers from the classic vice afflicting vague criminal statutes. A statute imposing penal sanctions must be sufficiently definite that a person of common intelligence can ascertain what conduct is proscribed under its terms. *Connally v. General Construction Company*, 269 U.S. 385, 391-393 (1926). Statutes with provisions like RICO's pattern definition and component (18 U.S.C §§ 1961(5), 1962), which define offenses or impose liability on the basis of minimum numbers of acts committed or associations engaged in, necessarily inject uncertainty regarding what conduct is rendered illegal. *See, e.g., Lanzetta v. New Jersey*, 306 U.S. 451, 456-457 (1939) (holding statute unconstitutionally vague that made it a crime to be a "gangster" and which defined a "gang" as "consisting of two or more persons"). The recurring inability of the federal judiciary to fix a definition of RICO's pattern requirement requires that it suffer the same fate as the statute struck down by this Court in *Lanzetta*. *Id.*

RICO's pattern component further offends due process because the efforts of this and other courts to interpret section 1961(5) have actually rendered the standard of liability imposed under RICO as subject to more, rather than less, conjecture and uncertainty. *HJ*, ___ U.S. at ___, 109 S. Ct. at 2907-2909 (Scalia, J., concurring). The Court's inconclusive effort to "delineate" the "continity" aspect of the pattern requirement underscores the point. The Court clearly regards continuity as primarily a "temporal" concept. *HJ*, ___ U.S. at ___, 109 S. Ct. 2902. However, just how long the alleged criminality must go on before the threat of continued criminal conduct is established remains elusive, even for the majority in *HJ*. Apparently, "a few months of racketeering activity (and who knows how much more?) is generally for free." *Id.* ___ U.S. at ___, 109 S. Ct. at 2908 (Scalia, J., concurring). The majority's response to Justice Scalia's criticism fails to offer any real test for determining what constitutes "longterm criminal activity." *Id.* ___ U.S. at ___, n.4, 109 S. Ct. at 2902 n.4.

The Court's chosen incremental vehicle to better develop the pattern requirement makes the urgency of the present constitutional challenge all the more significant. Courts facing vagueness challenges to statutes traditionally look to other court decisions or to the common law for guidance. *Lanzetta*, 306 U.S. at 457. This, of course, is impossible with respect to RICO's pattern requirement for two reasons. First, the Court has consigned further definition of the pattern element to "future cases." *HJ*, ___ U.S. at ___, 109 S. Ct. at 2902. The majority in *HJ* admit that even they cannot fix the definition for the lower courts in advance. Second, *Sedima* and its confusing aftermath have proven the inherent vagueness and uncertainty courts and litigants face in applying RICO's pattern component to actual conduct. Smith & Reed, *supra*, ¶ 4.03 at 4-14 n.2. The inability to define and apply a critical liability provision of a criminal statute consistently in light of voluminous case law or the common law is a persuasive indication that the statute is unconstitutional. *Connally*, 269 U.S. at 396.

C. The Second Circuit's Formulation Of RICO's Pattern Component Results In An Unconstitutionally Vague Standard Of Liability

The Second Circuit held that respondents' complaint adequately alleged a "pattern of racketeering activity" against petitioner because it pleaded "a basis from which it could be inferred that the [predicate racketeering] acts . . . were neither isolated nor sporadic (citation omitted)." App. A, *infra*, at A-13. Although the Second Circuit's approval of respondents' complaint and its holding in *Beauford* preceded this Court's opinion in *HJ*, the Second Circuit's disposition demonstrates the inherent vagueness of the pattern requirement and the weakness of *HJ* as a mechanism to bring more, rather than less, certainty to this troubled area of federal law. Because the Second Circuit's formulation of RICO's critical liability provision is essentially a subjective, standardless test, the statute is unconstitutionally vague as applied to petitioner in this instance.

Without any attempt whatsoever to weigh the sufficiency of respondents' allegations against each of the four RICO defendants separately, the court of appeals concludes that the sending of "false and excessive invoices and certifications over a period of nearly two years" (App. A, *infra*, at A-13), by defendants *other than petitioner*, provides a basis to infer that the acts of alleged racketeering are not isolated or sporadic. The Second Circuit, in applying *Beauford* to petitioner, does not even articulate the basis upon which it infers that petitioner's alleged conduct poses a threat of continuing criminal conduct. The practical implication of the Second Circuit's holding as applied to petitioner is a troubling preview of the case-by-case development of the pattern requirement. Apparently, a contractor's estimate of building costs allegedly concealed from petitioner by a different defendant, and the submission of allegedly excessive invoices in connection with one construction project, are enough to infer the existence of a "pattern" in the Second Circuit. *Compare Lipin Enterprises, Inc. v. Lee*, 803 F.2d 322, 324 (7th Cir. 1986) (repeated racketeering acts against a single victim insufficient to constitute pattern).

The Second Circuit's "inferential" standard, as is pointed out by Judge Winter's dissenting opinion below, is no standard at all.

App. A, *infra*, at A-16 ([Winter, J., dissenting] "I fear that my colleagues have adopted a test that may turn out to be no line at all."). Judge Winter's dissent focuses on the continuity element of the pattern requirement and concludes that the acts alleged in respondents' complaint are "inherently self-limiting" and "isolated." *Id.* Despite the Second Circuit's utilization of a mode analysis akin to this Court's discussion in *HJ*, it is clear that even within a single panel of the court of appeals there is no way to assure the consistent application of RICO's pattern component.

The inability to apply the continuity element of the pattern component of RICO consistently, compels a conclusion that the statute is void for vagueness under the due process clause of the fourteenth amendment. *Connally*, 473 U.S. 391-393.

II. A DECISION DIRECTING THE DEVELOPMENT OF RICO'S PATTERN REQUIREMENT AND RESOLVING ITS CONSTITUTIONALITY IS OF NATIONAL IMPORTANCE

It is simply unrealistic to believe that *HJ* will lead to the development of a consistent definition and application of the pattern requirement. Continuing uncertainty regarding RICO's pattern component demands that the Court aggressively direct the incremental development of this concept.

That RICO cases are numerous in the federal courts goes almost without saying. Lacovara & Aronow, *supra*, at 2-3. However, the national importance of defining RICO's liability standards permeates the state courts also since a number of courts have held or expressed a view that RICO is subject to concurrent federal and state jurisdiction. *Cianci v. Superior Court*, 40 Cal.3d 903, 221 Cal. Rptr. 575 (1985); *see also County of Cook v. Midcon Corp.*, 773 F.2d 892, 905 n.4 (7th Cir. 1985).

The inability to fashion a pattern definition also raises serious concerns about the consistent application of RICO's criminal provisions. By renewing but not resolving the uncertainty concerning what activity constitutes a pattern of racketeering activity under RICO, *HJ* raises the very real and continuing prospect that criminal defendants will escape liability simply by virtue of the federal circuit they are prosecuted in. Prosecutors, plaintiffs and

criminal defendants, as well as those persons engaged in legitimate commercial activity attempting to order their affairs to avoid the "racketeer" label, desperately need the Court's authoritative guidance on this issue.

By the same token, if the Court believes that RICO's pattern component is unconstitutional, it should meet the issue early to avoid the years of needless litigation that characterized the time between *Sedima* and *HJ*. If the Court refuses to deal with the constitutional issue, it will have again abandoned its responsibility to thwart unnecessary RICO litigation. *Sedima*, 473 U.S. at 523 (Marshall, J., dissenting).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix A

United States Court of Appeals
for the Second Circuit

No. 37—August Term 1987

(Argued September 18, 1987 Decided June 22, 1989)

Docket No. 87-7324

The Procter & Gamble Company and
Riverview Productions, Inc.,
Plaintiffs-Appellants,

v.

Big Apple Industrial Buildings, Inc., Arol I. Buntzman,
Martin William Halbfinger, Esq., George A. Fuller Company,
The Arkhon Corporation, Haines Lundberg Waehler, and
John Does 1-10,
Defendants-Appellees.

Filed June 22, 1989

CARDAMONE, Circuit Judge:

In *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 500, 105 S.Ct. 3275, 3287, 87 L.Ed.2d 346 (1985), the Supreme Court challenged Congress and the lower federal courts to develop a "meaningful concept" of the quintessential insignia of a violation of the Racketeer Influenced and Corrupt Organizations Act (RICO)—"pattern of racketeering activity." The Court provided some instruction in its oft-quoted footnote 14. *Id.* at 496, 106 S.Ct. at 3285. The problem is of serious consequence because a RICO trial often becomes a "megatrial" with large numbers of unrelated defendants—charged with unconnected wrongs—tried together under the rubric of a single conspiracy. A RICO conviction subjects a defendant to a possible 20-year prison term and a fine of $25,000. 18 U.S.C. § 1963(a). In two recent cases considered and decided *en banc*, we accepted the Supreme Court's challenge. *See Beauford v. Helmsley*, 865 F.2d 1386 (2d Cir. 1989) (*en banc*); *United States v. Indelicato*, 865 F.2d 1370 (2d Cir. 1989) (*en banc*).

The present appeal was argued a considerable time ago on September 18, 1987. Decision has been delayed awaiting the resolution of the two above *en banc* cases that were decided on January 13, 1989. Subsequently, the parties, at our suggestion, rebriefed the instant appeal in March 1989 in light of *Beauford* and *Indelicato*.

BACKGROUND

The facts alleged in plaintiffs' complaint relate to the lease and consturction of the "Riverview Studio Complex," a high-tech television and motion picture production facility. In 1983, plaintiff the Procter & Gamble Company (P & G) and its advertising agency D'Arcy Masius Benton & Bowles, Inc. (Benton & Bowles) began looking for new studio space for the production of P & G's three soap operas. After considering at least eight sites in the New York metropolitan area, their search settled on the Washburn Wire Factory, an abandoned manufacturing plant located in Manhattan between East 116th and 119th Streets and owned by defendant Big Apple Industrial Buildings, Inc. (Big

Apple). Defendant Arol Buntzman, president of Big Apple, and his attorney, defendant Martin W. Halbfinger, approached P & G with a plan to convert the factory into a state-of-the-art production complex, misrepresenting Big Apple's experience and expertise in conducting major renovation projects and exaggerating the completed site's potential as a tourist attraction.

During the course of negotiations beginning in the spring of 1984 Buntzman repeatedly stated that "hard" construction costs would not exceed $18 million and that the total project would cost approximately $25 million. The $18 million figure was supported by a letter Buntzman had received from the proposed general contractor, defendant George A. Fuller Co. (Fuller), estimating actual construction costs at $17,612,000. It later turned out that Fuller made this estimate simply by multiplying costs per square foot of comparable projects by the subject project's approximate square footage. Fuller did not determine actual construction costs based upon plans and specifications for building the project on this site. Hence, the estimate was unrealistic.

In January 1985, plaintiff Riverview Productions, Inc. (Riverview)—a wholly-owned subsidiary of Benton & Bowles formed to act for P & G in the studio project and whose obligations P & G guaranteed—entered into a ten-year lease and lease guaranty with Big Apple. The lease was for the three as yet unbuilt studios—the Riverview Studio Complex—at an annual rental of $1.2 million, plus Big Apple's annual debt service, including amortization over ten years of a loan for the entire construction cost of the project. As the transaction was originally structured, Big Apple as owner was to obtain a construction loan based on P & G's lease guaranty, but P & G and Riverview were to have no further role in securing construction financing.

Nonetheless, because Big Apple had difficulty obtaining a construction loan, it asked P & G to guarantee the loan. P & G initially refused. Meanwhile, Riverview was pressing Big Apple for more precise cost estimates. Plaintiffs allege that when Fuller conducted a more thorough cost survey and placed "hard" construction costs in the vicinity of $40 million, Big Apple squelched this estimate and hired an outside consultant who—on the basis of inaccurate information—computed "hard" costs at $22.7 mil-

lion. At that time, Buntzman as head of Big Apple assured P & G and Riverview that their resulting calculation of $30-35 million for the project's total cost was too high. On the basis of the new $22.7 million "hard" cost figure, P & G eventually agreed to guarantee the construction loan.

In a June 6, 1985 "Tri-Party Agreement" between P & G, Riverview, and Big Apple, P & G agreed to guarantee financing up to $25 million to be provided by Citibank N.A. ($22 million in "hard" costs, $3 million in "soft" costs). The $25 million limit was reached in early 1986. Thereafter, P & G extended its guaranty on a requisition-by-requisition basis until April 1986, when the loan totalled $32 million. Throughout the months of financing, Big Apple continued to mislead plaintiffs regarding the Riverview Studio Complex's actual costs and to conceal the second, more accurate Fuller estimate.

On May 2, 1986 plaintiffs P & G and Riverview filed a complaint asserting various state law causes of action for fraud and conversion as well as violation of the Racketeer Influenced and Corrupt Organizations (RICO) statute, 18 U.S.C. §§ 1961-1968 (1982 & Supp. IV 1986). The RICO defendants are Big Apple, Halbfinger, Buntzman, and Fuller. Plaintiffs' claims against Haines Lundberg Waehler, an architectural, engineering, and planning firm, allege essentially architectural malpractice; plaintiffs charge the Arkhon Corporation, a construction manager of building projects, with breach of its management contract and of an implied warranty. Plaintiffs seek treble damages based on the RICO violations and rescission of the Lease, the Lease Guaranty, and the Tri-Party Agreement.

In addition to alleging that the RICO defendants fraudulently convinced plaintiffs to lease and guarantee financing for the studio complex, plaintiffs accuse the RICO defendants of repeated illegal siphoning of project funds. Plaintiffs allege that Big Apple improperly and excessively requisitioned millions of dollars over a nine-month period, including $657,000 in fees and disbursements to Halbfinger for 13 months' legal services, a $625,000 construction manager's fee to defendant Arkhon Corporation, and other excessive, duplicative, or unauthorized expenditures. Moreover, defendants Big Apple and Halbfinger are claimed to have fraudu-

lently abused escrow accounts by inflating requisitions in order to "cushion" them against the possibility that plaintiffs would detect their fraud. Finally, plaintiffs contend that defendants repeatedly and falsely blamed P & G and Riverview for construction delays so that they could justify charging "interim rent" for unproductive periods.

On motions to dismiss the complaint under Fed.R.Civ.P. 9(b), 12(b)(1), and 12(b)(6), Judge Leval of the United States District Court for the Southern District of New York ruled that the alleged racketeering activity was not sufficiently continuous or related to constitute a RICO violation. Because the RICO claim was the only basis for federal jurisdiction, Judge Leval dismissed the complaint without prejudice to permit repleading of the state law claims in an appropriate forum. *Procter & Gamble Co. v. Big Apple Indus. Buildings, Inc.*, 655 F.Supp. 1179 (S.D.N.Y.1987). From the dismissal of their complaint, plaintiffs appeal. We now reverse and reinstate the RICO complaint.

DISCUSSION

As part of the Organized Crime Control Act of 1970, Congress enacted the Racketeer Influenced and Corrupt Organizations Act, Pub.L. No. 91-452, 84 Stat. 941 (1970) (codified as amended at 18 U.S.C. §§ 1961-1968) (RICO or the Act), to combat the infiltration into and corruption of America's legitimate business community by organized crime. *Id.* § 1, 84 Stat. at 943 (statement of findings and purpose). The Act's substantive provisions are contained in § 1962, which outlaws the use of income "derived . . . from a pattern of racketeering activity" to acquire an interest in, establish, or operate an enterprise engaged in or affecting interstate commerce (subdivision (a)); the acquisition or maintenance of any interest in or control of such an enterprise "through a pattern of racketeering activity" (subdivision (b)); the conduct or participation "in the conduct of such enterprise's affairs through a pattern of racketeering activity" (subdivision (c)); and conspiring to do any of the above (subdivision (d)). 18 U.S.C. § 1962. Those activities that congress sought to prohibit are contained in 18 U.S.C. § 1962 set forth in the

margin.[1] Reading subdivisions (a), (b) and (c) of that section makes it clear that a valid RICO charge must allege the existence of both an enterprise and a pattern of racketeering activity.

In their complaint, plaintiffs refer to § 1962(b), (c), and (d). We agree with the district court that the facts alleged relate only to § 1962(c), and possibly to conspiracy under subdivision (d) to violate subdivision (c). *See United States v. Turkette*, 452 U.S. 576, 584, 101 S.Ct. 2524, 2529, 69 L.Ed.2d 246 (1981) (§ 1962(b) addresses organized crime's infiltration of legitimate business enterprises); *United States v. Parness*, 503 F.2d 430, 438-39 (2d Cir.1974) (acquiring casino hotel by twice transporting stolen cashier's checks violates § 1962(b)), *cert. denied*, 419 U.S. 1105, 95 S.Ct. 775, 42 L.Ed.2d 801 (1975).

On this appeal, we are asked whether the facts alleged are sufficient as a matter of law to support plaintiffs' claim that the defendants' conduct formed such a pattern of racketeering activity in violation of § 1962. Taking all of the allegations of plaintiffs' complaint as true, we conclude that a RICO claim was suffi-

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[1] 18 U.S.C § 1962 provides in relevant part

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce . . .

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

ciently pleaded and that a reasonable trier of fact could have found a pattern of racketeering activity. *See Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957) ("[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."). Our reasons follow.

I Elements of a RICO Claim: "Enterprise" and "Pattern of Racketeering Activity"

To state a § 1962(c) claim plaintiffs must allege the conduct of an enterprise through a pattern of racketeering activity. *Sedima*, 473 U.S. at 496, 105 S.Ct. at 3285; *see Moss v. Morgan Stanley Inc.*, 719 F.2d 5, 17 (2d Cir.1983), *cert. denied*, 465 U.S. 1025, 104 S.Ct. 1280, 79 L.Ed.2d 684 (1984). A pattern of racketeering activity is a series of *criminal acts* as defined in § 1961(1), and the enterprise is generally a *group of persons* associated together for a common purpose of engaging in a course of conduct. *Sedima*, 473 U.S. at 496, 105 S.Ct. at 3285; 18 U.S.C. § 1961(4) (defining "enterprise" as including "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity"). Evidence of an ongoing organization, the associates of which function as a continuing unit, suffices to prove an enterprise. *Turkette*, 452 U.S. at 583, 101 S.Ct. at 2528.

Congress' definition of the RICO pattern of racketeering activity differs from its other RICO definitions; that is, the statute declares that most of the other terms "mean" something, *see, e.g.*, § 1961(1) & (2), while it also provides that " 'pattern of racketeering activity' *requires at least* two acts of racketeering activity, . . . the last of which occurred within ten years . . . after the commission of a prior act of racketeering activity." 18 U.S.C. § 1961(5) (emphasis added). This "at least" language in the definition suggests that though two predicate acts must be present at a minimum to constitute a pattern, two acts alone will not always suffice to form a pattern. *See Sedima*, 473 U.S. at 496 n. 14, 105 S.Ct. at 3285 n. 14 ("The implication is that while two acts are necessary, they may not be sufficient."); *Indelicato*, 865

F.2d at 1382 ("The legislative history is . . . inconsistent with a rule that any two acts of racketeering activity, without more, suffice to establish a RICO pattern.").

In *Sedima*, the Supreme Court discussed the legislative history of the pattern requirement:

> As the Senate Report explained: "The target of [RICO] is thus not sporadic activity. The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of *continuity plus relationship* which combines to produce a pattern." S.Rep. No. 91-617, p. 158 (1969) (emphasis added). Similarly, the sponsor of the Senate bill, after quoting this portion of the Report, pointed out to his colleagues that "[t]he term 'pattern' itself requires the showing of a relationship . . . So, therefore, proof of two acts of racketeering activity, without more, does not establish a pattern . . . " 116 Cong.Rec. 18940 (1970) (statement of Sen. McCellan). See also *id.*, at 35193 (statement of Rep. Poff) (RICO "not aimed at the islolated offender"); House Hearings, at 665.

473 U.S. at 496 n. 14, 105 S.Ct. at 3285. The Court later noted the need for lower federal courts "to develop a meaningful concept of 'pattern.' " *Id.* at 500, 105 S.Ct. at 3287.

In sum, when facing a RICO count in an indictment or complaint, a district court must determine whether it independently alleges both an enterprise—a group of persons in an ongoing association—and a pattern of racketeering activity—a series of allegedly criminal acts. Further, for a pattern to exist, the alleged criminal acts should be characterized by their relatedness and continuity. An enterprise may be sufficiently alleged, but if a pleading does not indicate the existence of both components of the pattern of racketeering activity, a RICO claim should be dismissed. *See Indelicato*, 865 F.2d at 1383 (noting that these concepts are not rigid, and that "[t]he nature of the enterprise may also serve to show the threat of continuing activity"). We turn to an examination of the concepts of continuity and relatedness.

II Continuity and Relatedness

A. *Continuity*

In the wake of *Sedima*, other courts have interpreted "continuity" in footnote 14 to require plaintiffs to allege multiple schemes in order to establish a pattern of racketeering activity. *See H.J. Inc. v. Northwestern Bell Tel. Co.*, 829 F.2d 648, 650 (8th Cir.1987) ("A single fraudulent effort or scheme is insufficient."), *cert. granted*, ____U.S.____, 108 S.Ct. 1219, 99 L.Ed.2d 420 (1988); *International Data Bank, Ltd. v. Zepkin*, 812 F.2d 149, 154 (4th Cir.1987) (requiring multiple criminal episodes to demonstrate continuity); *Superior Oil Co. v. Fulmer*, 785 F.2d 252, 257 (8th Cir.1986) (holding that defendants' actions in converting liquid petroleum gas failed to show sufficient continuity because they "comprised one continuing scheme to convert gas from Superior Oil's pipeline"); *Northern Trust Bank/O'Hare N.A. v. Inryco, Inc.*, 615 F.Supp. 828, 832 (N.D.Ill. 1985) ("It is difficult to see how the threat of continuing activity . . . could be established by a single criminal episode."). *But see California Architectural Bldg. Prods. Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1469 & n. 1 (9th Cir.1987) (rejecting "multiple episode" requirement), *cert. denied*, ____U.S.____, 108 S.Ct. 699, 98 L.Ed.2d 650 (1988); *Bank of America Nat'l Trust & Sav. Ass'n. v. Touche Ross & Co.*, 782 F.2d 966, 971 (11th Cir.1986) (rejecting defendants' argument that predicate acts must occur in different criminal episodes and holding that nine acts of wire and mail fraud involving the same parties over a three-year period in the course of single scheme satisfy the pattern requirement); *R.A.G.S. Couture, Inc. v. Hyatt*, 774 F.2d 1350, 1355 (5th Cir.1985) (complaint alleging that defendants twice mailed fraudulent invoices satisfied pattern requirement because the alleged acts were related).

We have explicitly eschewed any multiple scheme or episode requirement to demonstrate the continuity of the pattern or racketeering activity. *Indelicato*, 865 F.2d at 1383. Noting that the statutory definition of racketeering activity was cast in terms of "acts" or "offenses," without mention of schemes, episodes, or transactions, we concluded that Congress did not mean "to exclude from the reach of RICO multiple acts of racketeering

simple because they achieve their objective quickly or because they further but a single scheme." *Id.* Thus, continuity may be demonstrated in various ways, such as from the nature of the enterprise as in *Indelicato*, or from the sheer number of predicate acts over several years, or from the number of schemes. As we said in *Beauford*, "[w]hat is required is that the complaint plead a basis from which it could be inferred that the acts . . . were neither isolated nor sporadic." 865 F.2d at 1391.

B. *Relatedness*

We next consider the concept of relatedness. In *Sedima*, the Supreme Court suggested that congress' definition of "pattern" in a later provision of the Organized Crime Control act of 1970, 18 U.S.C. § 3575(e) (1982), *repealed by* Sentencing Reform act of 1984, Pub.L.No. 98-473, tit. II, §§ 212(a)(2) and 235(a)(1), 98 Stat.1987, 2031, might illuminate the meaning of the pattern of racketeering activity requirement of § 1962. *See Sedima*, 473 U.S. at 496 n. 14, 105 S.Ct. at 3285 n. 14 (citing *Iannelli v. United States*, 420 U.S. 770, 789, 95 S.Ct. 1284, 1295, 43 L.Ed.2d 616 (1975)). Section 3575(e) appears to be especially helpful in construing the requirement of a "relationship" among racketeering acts: "[C]riminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." 18 U.S.C. § 3575(e) (quoted in *Sedima*, 473 U.S. at 496 n. 14, 105 S.Ct. at 3285 n. 14). In *Indelicato* we set forth a non-exclusive elaboration of § 3575(e). A pattern may be found, for example, from an examination of the interrelationship between acts including similarity of goals, methods of their accomplishment, repetitiousness, and closeness of temporal proximity. *See* 865 F.2d at 1382.

We have, moreover, used these factors to evaluate an appellant's claim that there was insufficient evidence to support a jury's finding that a RICO pattern existed. *See United States v. Teitler*, 802 F.2d 606 (2d Cir. 1986). There, appellants were attorneys accused of defrauding insurance companies by creating false documents and encouraging clients to commit perjury in order to inflate the value of automobile accident claims. *Id.* at 608-09.

Finding "ample evidence" of a pattern of wrongdoing, we affirmed a RICO conviction on two charges of mail fraud, finding that "the evidence showed that both of the acts of racketeering charged against the appellant had a similar purpose, namely, defrauding insurance companies; both shared similar success in defrauding such companies; both shared similar participants and similar victims; and both employed similar methods." *Id.* at 612. The question that must always be answered, therefore, is whether a complaint adequately alleges facts from which it may be inferred that the predicate acts are interrelated, using the above factors as indications of relatedness.

C. *Summary of Continuity and Relatedness*

For the purposes of RICO, "continuity" means that separate events occur over time and perhaps threaten to recur, while "relatedness" means—given that different acts of racketeering activity have occurred—that there is a way in which the acts may be viewed as having a common purpose. These concepts are separately compartmentalized for analytic purposes, largely to ensure that the wrongful activity alleged is neither sporadic nor isolated, and that the acts have similar or common purpose and direction. The Supreme Court instructs that "[w]hile the proof used to establish these separate elements [of enterprise and pattern] may in particular cases coalesce, proof of one does not necessarily establish the other." *Turkette*, 452 U.S. at 583, 101 S.Ct. at 2529. Ordinarily, proof of these concepts of continuity and relatedness in the pattern will vary in each case.

Our decisions in *Indelicato* and *Beauford* are illustrative. In the former, proof of the purpose and nature of the RICO *enterprise*, combined with the character of the offenses charged, satisfied the requirement of continuity because it tended to prove a threat of ongoing RICO activity. *Indelicato*, 865 F.2d at 1383, 1384-85. The predicate acts—three assassinations of rival Cosa Nostra family leaders—occurred with virtual simultaneity. Yet, despite the seemingly finite duration of the predicate acts, the threat of continuity clearly existed in view of the RICO enterprise and its obvious drive for greater wealth and power. *Id.* at 1384-85; *see also United States v. Watchmaker*, 761 F.2d 1459 (11th Cir. 1985) (virtually simultaneous shootings of three police officers

satisfied RICO pattern requirement for member of the Outlaw Motorcycle Club), *cert. denied*, 474 U.S. 1100, 106 S.Ct. 879, 88 L.Ed.2d 917 (1986).

In *Beauford*, "the nature of the enterprise [did] not of itself suggest that the racketeering acts [would] continue." 865 F.2d at 1391. The continuity or threat of continuity necessary to adequately allege a RICO pattern was found by focusing on factors other than enterprise. *Id.* Plaintiffs alleged that when seeking to convert a large apartment complex into condominium units, defendants mailed to thousands of tenants and prospective buyers an offering plan that contained material misrepresentations and omissions amounting to fraud. Their allegations of more than 8,000 acts of mail fraud—all directed toward the common goal of inflating profits from the conversion—satisfied the relatedness requirement. *Id.* at 1392. We found the necessary continuity or threat of continuity in the assertions in plaintiffs' complaint that a large percentage of apartments were as yet unsold, the offering plans had been amended, and further amendments were likely. The pleadings thus sufficiently alleged the basic requirements of a RICO cause of action. *Id.*

III Analysis of Instant Complaint

We therefore turn to an analysis of the plaintiffs' complaint in light of the above discussed concepts. The district court characterized the RICO complaint as alleging "a scheme by a contractor to bilk its customer as to a construction project." 655 F.Supp. 1179, 1182 (S.D.N.Y.1987). It found that the necessary element of continuity was lacking principally because the "single, finite project" was not of a continuing nature, without "continuing criminal objectives"—notwithstanding the allegations in the complaint of five separate fraudulent episodes. Thus, the district court judge focused on the element of *enterprise*, relying understandably on the now-rejected view expressed in *United States v. Ianniello*, 808 F.2d 184, 191 (2d Cir.1986), *cert. denied*, 486 U.S. 1006, 107 S.Ct. 3229, 97 L.Ed.2d 736 (1987). *See Indelicato*, 865 F.2d at 1382 (discussing *Ianiello)*. Concluding that defendants were "engaged in a single lawful project of finite scope and duration," the district judge dismissed the RICO cause of action

despite "[a]llegations of numerous instances of fraud." 655 F.Supp. at 1184.

Subsequent to Judge Leval's ruling, of course, we have held explicitly that "relatedness and continuity are essentially characteristics of [the pattern of racketeering] activity rather than of enterprise." *Indelicato,* 865 F.2d at 1382: *see also Beauford,* 865 F.2d at 1391. Moreover, we have rejected any need to allege multiple schemes. *See Beauford,* 865 F.2d at 1391. In this Circuit, a RICO claim may be adequately pleaded without an allegation of "an ongoing scheme having no demonstrable ending point." *Id.* Again, the complaint must provide allegations sufficient to infer that an enterprise exists, and that the acts of racketeering were neither isolated nor sporadic.

Against this standard it is clear that plaintiffs alleged an adequate and colorable cause of action under RICO. Their complaint plainly asserts the existence of a RICO enterprise or "group of persons associated together for a common purpose of engaging in a course of conduct" which functioned then as a "continuing unit." *See Turkette,* 452 U.S. at 583, 101 S.Ct. at 3528. A pattern of racketeering activity may be discerned from the facts alleged in plaintiffs' 77-page complaint. It claims that defendants engaged in at least five separate fraudulent schemes: (1) inducing execution of the ten-year studio lease by fraudulently misstating their experience, expertise, and construction cost estimates; (2) inducing plaintiffs to continue with the project, and inducing P & G to guarantee construction financing by fraudulently misrepresenting and concealing costs; (3) fraudulently diverting construction funds and charging excessive professional and other fees; (4) improperly escrowing construction loan funds to build a "cushion" against discovery of the alleged fraud; and (5) fraudulently scheming to collect "interim rent" for delays primarily caused by defendants.

These violations of the Federal Mail Fraud Act, 18 U.S.C. §§ 1341-1343 (1982), resulting from written and oral misrepresentations as to defendants' expertise, as to construction costs, and from sending false and excessive invoices and certifications over a period of nearly two years, are not isolated or sporadic actions. *See Beauford,* 865 F.2d at 1391-92. While multiple

schemes are not essential for demonstrating continuity or a threat of continuity, here it is alleged that defendants conducted fraudulent business activities on a number of fronts in five separate schemes. Our dissenting colleague's characterization of this conduct as "isolated", and his attempt to draw a line that limits civil RICO to those cases where the threat of continuing activity "truly exists" apparently ignores the fact that the instant litigation is only at the pleading stage. Whether defendants' actions are continuing in nature or isolated or sporadic will be the subject of proof at trial. The accepted-as-true allegations in the complaint refute the view that defendants' fraudulent actions towards plaintiffs were unrelated or disconnected. Hence, the spectre of continuity of criminal offenses in the pattern of activity is sufficiently pleaded to withstand dismissal at this stage of the litigation. *See Sedima*, 473 U.S. at 496 n. 14, 105 S.Ct. at 3285 n. 14. *Beauford*, 865 F.2d at 1391-92.

Finally, the complaint sufficiently alleges the relatedness between predicate acts to demonstrate a pattern. The alleged acts had the same purpose, that is, fleecing the same victims—P & G and Riverview—and employing similar unlawful methods of commission—namely, the misrepresentation of Big Apple's experience, of construction costs and the padding of billings to plaintiffs. *See Indelicato*, 865 F.2d at 1383. Consequently, the pleading satisfied the basic elements of a RICO cause of action by alleging the conduct of that enterprise through a pattern of racketeering activity, and that the pattern was characterized by the relatedness and continuity of the underlying criminal acts.

CONCLUSION

The judgment of the district court is accordingly reversed, the complaint reinstated, and the matter is remanded to the district court for further proceedings on the merits.

WINTER, Circuit Judge, dissenting:

Acknowledging the difficulty of the question at issue, I respectfully dissent.

Our recent decisions in *United States v. Indelicato*, 865 F.2d 1370 (2d Cir.1989) (en banc) and *Beauford v. Helmsley*, 865 F.2d 1386 (2d Cir.1989) (en banc), teach that the existence of the relatedness and continuity requisite to a finding of a pattern of racketeering activity is to be determined by viewing the facts or allegations as a whole and without the application of mechanical tests such as requirements of multiple or open-ended schemes or separation of temporal acts. *Id.* at 1391. My disagreement with my colleagues stems from their holding that any allegation of multiple related acts separated in time is, without more, enough to establish continuity.

The fact that multiple acts separated in time may not by themselves be sufficient was one reason that *Indelicato* and *Beauford* distinguished between enterprises that are inherently criminal and those that are not. In the case of the former, multiple acts in furtherance of the enterprise necessarily carry with them the threat of continuing illegal activity even if simultaneous. In the case of the latter, multiple acts even if separated in time do not necessarily carry with them that threat. *Id.* We thus held in *Beauford* that a complaint stated a valid civil RICO claim where there had been thousands of fraudulent mailings to an indeterminate number of largely unrelated victims—all persons who might be interested in purchasing one of several thousand apartments—*and* there was an expectation based on the anticipated rate of sales and the need to update offering papers that "similarly fraudulent mailings would be made over an additional period of years." 865 F.2d at 1392.

The present case is very different, however. First, in *Beauford* there were vastly greater numbers of fraudulent acts and there was an explicit intention to continue the mailings. Second, the sole victims of the fraud in the present case are two corporations working essentially as principals in a joint venture to complete a single construction project. In contrast, the victims in *Beauford* were a segment of the general public. It simply belies belief that the racketeering acts alleged here—misrepresentations to Procter & Gamble and Riverview as to expertise, cost estimates, actual costs and various diversions of funds with regard to one project—were not inherently self-limiting. The defendants surely had

testable expectations as to progress in the construction that would be directly affected by the fraudulent acts. The length and breadth of the plaintiffs' allegations being those acts, these defendants and that project, I have no hesitation in labeling the conduct here "isolated."

To be sure, it was the case in *Beauford* that the fraud would ultimately cease, but only because of the wisdom in Lincoln's dictum that you can fool some of the people some of the time but not all of the people all of the time. Where the enterprise is not inherently criminal, fraudulent acts directed to large numbers of unrelated people entail a far different risk of a continuation of illegal acts than do acts directed at a small number of related commercial entities capable of quickly learning the true facts. This distinction is of considerable importance in the RICO context. If adopted, it would limit civil RICO to those cases most likely to involve sustained harm to the public and would avoid transforming every private dispute over a periodic performance contract into a RICO claim. It may be that the line I am seeking to draw is neither bright nor straight, but it is a line that is discernible and of usefulness in limiting civil RICO to situations in which the threat of continuing activity truly exists. Moreover, I fear that my colleagues have adopted a test that may turn out to be no line at all. If, for example, a lumber yard selling to the Riverview project were to deliver five loads of lumber in each of which one two-by-four was missing and then mail five bills for the full amount, a civil RICO claim could be alleged under their theory.

I therefore respectfully dissent.

Appendix B

United States District Court
Southern District of New York
No. 86 Civ. 3474 (PNL)

The Procter & Gamble Company
and Riverview Productions, Inc.,
Plaintiffs,

v.

Big Apple Industrial Buildings, Inc.,
Arol I. Buntzman, Martin William Halbfinger, Esq.,
George A. Fuller Company, the Arkhon Corporation,
Haines Lundberg Waehler and John Does 1-10,
Defendants.

Filed March 13, 1987

OPINION AND ORDER

LEVAL, District Judge.

This is an action for rescission and treble damages pleading a violation of the Racketeering Influenced and Corrupt Organizations ("RICO") statute, 18 U.S.C. § 1961 *et seq.* as well as various state law causes of action for fraud and conversion. The court jurisdiction is alleged to depend on 28 U.S.C. § 1331 by reason of the claim under the federal RICO statute. Defendants move to dismiss on the grounds that the complaint fails to plead a valid RICO claim.

Background

For the purpose of the motions to dismiss, the allegations of the complaint are taken as true.

The Procter & Gamble Company ("P & G"), plaintiff, produces several daytime television serials—"soap operas." In the past these programs were produced in the New York studios of the various networks. In 1983, P & G, together with its advertising agency Benton & Bowles, began looking for alternative sites for the production of these shows. Eight New York City sites

were considered, including the Washburn Wire Factory (between E. 116th and E. 119th at the FDR Drive) owned by defendant Big Apple Industrial Buildings ("Big Apple"). Defendant Arol Buntzman, President and owner of Big Apple, approached P & G with a plan to renovate the old factory and develop a state-of-the-art television and film complex, unequaled outside of California. Buntzman, together with his attorney, defendant Martin Halbfinger, represented to P & G that Big Apple possessed sufficient experience and expertise to make the proposed project a reality. The complaint alleges that this was the beginning of "a pervasive and ongoing course of fraudulent conduct. . . ."

In the Spring of 1984, Buntzman sent several communications to Benton & Bowles allegedly exaggerating Buntzman's abilities and experience and explaining that the completed site would attract millions of visitors each year, thus netting additional profits for P & G. In response to requests by P & G, Buntzman estimated construction costs at approximately $18 million and total costs at $25 million. This estimate was supported by a letter from the proposed general contractor, defendant George A. Fuller Co., to Buntzman adopting the $18 million figure.

Plaintiff Riverview Productions was incorporated as a wholly owned subsidiary of Benton & Bowles to act for P & G in connection with the studio project. In January 1985 Riverview entered into a ten-year lease with Big Apple for the three as yet unbuilt studios. The terms were set at $1.2 million annual ground rent, plus amortization over the ten years of a loan for the entire construction costs of the project. P & G guaranteed Riverview obligations.

Big Apple then experienced difficulty securing construction financing, and requested that P & G agree to guarantee a construction loan. At first P & G refused. During this time, Riverview continued its efforts to obtain precise estimates of construction costs. It is alleged that although Fuller estimated total costs at $40 million this was never divulged to P & G. Big Apple instead employed an outside consultant to make a new estimate of costs, which came in at $22.7 million for "hard" costs. This estimate was disclosed to plaintiffs, who thereupon estimated

total costs in the $30-35 million range. Buntzman repeatedly assured P & G that these estimates were much too high.

In June 1985, P & G agreed to guarantee the loan. In the "Tri-Party Agreement," P & G agreed to guarantee $25 million of financing to be provided by Citibank and committed itself to fund the project if Citibank failed to do so. P & G later agreed to provide an additional $7 million in guarantees.

The complaint alleges that once construction on the project got underway, defendants made excessive and improper requisitions from Citibank, including $617,344.25 in legal fees for thirteen months for defendant Halbfinger, as well as additional charges for specific services already covered in the base contract price. Plaintiffs further allege that defendants have fraudulently abused escrow accounts, building a cushion against the possibility that their fraud would be detected and subsequently making improper withdrawals from these accounts.

* * *

Defendants move to dismiss the complaint alleging lack of federal subject matter jurisdiction. The sole asserted basis for federal jurisdiction is the seventh cause of action, which alleges that defendants Buntzman, Halbfinger, Big Apple, and Fuller violated the RICO statute, 18 U.S.C. § 1962(b), (c), and (d).[1] Defendants contend these allegations do not implicate a violation of RICO.[2]

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[1] Although the complaint refers to § 1962(b), (c) and (d), it is clear that the only portion to which the alleged facts relate are (c) and/or conspiracy under (d) to violate (c).

[2] As a threshold matter, the complaint is clearly defective for failure to allege properly the "racketeering activity," within the scope of the statute. Although the complaint alleges the "sending" of many fraudulent letters and requisitions from one party to another, there is only one instance where mailing is alleged. At oral argument, plaintiffs claimed that this omission was merely inartful pleading, easily remedied by the filing of an amended complaint. Were this the only problem with the complaint, repleading might well be the proper course. I find, however, for the reasons stated in this opinion that the facts alleged in the

Discussion

The question posed by this motion is whether a contractor who puffs as to his experience and seeks to fleece his customer by underestimating costs and mailing padded bills has thereby violated the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962, *et seq.*, making him liabile to 20 years imprisonment, criminal and civil forfeitures, treble damages and attorneys' fees.

Accusations that the contractor has overstated his experience, understated the expected costs and overstated completed work used in bills for progress payments are as common to construction as steel, bricks and mortar. If those allegations implicate RICO, it is safe to assume that henceforth virtually every construction dispute will be waged in federal court as a RICO matter. Plaintiff-owners who previously asserted claims of fraud or breach of contract against the contractor in the state courts will now qualify for triple damages plus attorneys' fees, merely by asserting that the two or more false statements constituted a "pattern of racketeering activity." I am persuaded that the facts alleged here, although they may well support a state law fraud action, do not establish a violation of the federal RICO statute.

For years courts have groped to develop meaningful standards for determining the scope of this confusing statute. Controlling guidance comes from the Supreme Court's recent opinion in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 105 S.Ct. 3275, 3285, 3287, 87 L.Ed.2d 346 (1985). After stating that "[a] violation of § 1962(c) . . . requires (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity," the Court attributed the unjustified expansion of civil RICO litigation, in part, to "the failure of Congress and the courts to develop a meaningful concept of 'pattern'." In note 14, which has become the principal source of guidance for these endeavors, the Court quoted the following passage from the Senate Report:

> "The target of [RICO] is thus not sporadic activity. The infiltration of legitimate business normally requires more

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complaint would not satisfy the "pattern" requirement, even were allegations of mailings included.

> than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of *continuity plus relationship* which combines to produce a pattern." S.Rep. No. 91-617, p. 158 (1969) (emphasis added) . . . .

105 S.Ct. 3275, 3285 n. 14.

This passage, which has since been cited by the Court of Appeals for the Second Circuit as authoritative, *United States v. Teitler*, 802 F.2d 606, 611 (2d Cir.1986), furnishes the key to the present motion.

A violation of § 1962(c) is not reducible to any instance of fraud or frauds involving two or more mailings. It requires the "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity . . . ." And the requirement of the *pattern* is not satisfied without "continuity plus relationship."

Thus the identification of a few unrelated instances of fraudulent activity in an essentially lawful organization (for example, a charge that within a nationwide stock brokerage house, a salesman in Phoenix and another in New York had each independently engaged in a fraudulent transaction) would not satisfy the element of relationship between the frauds or of conduct of the enterprise. *See Teitler*, 862 F.2d at 611 ("sporadic activity" is not a pattern). On the facts alleged in this case, the deficiency pertains primarily to the other element of the pattern requirement. An undertaking by a contractor engaged in a lawful enterprise to bilk one customer in one construction project of finite duration and scope does not satisfy the "continuity" element of the pattern of racketeering.[3]

Both continuity and relationship, as well as the breadth necessary to satisfy the element of conduct of an enterprise through a pattern, must be present to prevent trivialization of RICO's requirements and its invocation, with concomitant federal jurisdiction, in practically every allegation of fraud. The allegation

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[3] As an additional problem, I would question whether a contractor's defrauding of one customer for a single finite construction project involved sufficient breadth of criminal activity to constitute the conduct of an enterprise through a pattern of fraud.

here of a scheme by a contractor to bilk its customer as to a construction project, even by repeated fraudulent assertions, is not sufficient to involve the RICO statute.

Plaintiff seeks comfort from the Court of Appeals' recent decision in *United States v. Ianniello*, 808 F.2d 184 (2d Cir.1986). Although there is language in *Ianniello* which on a superficial reading can give apparent support to plaintiff's argument, this notion disappears when the language is read carefully in the context of the facts and the holding. The defendants in *Ianniello* were "part of a group that skimmed profits from bars and restaurants that they owned and operated in New York City." 808 F.2d at 186. The proof showed numerous episodes of fraudulent skimming activity continuing over a period of years at several different bars and restaurants owned or operated by defendants. The principal defendants concealed their interests in the businesses, made false applications to the State Liquor Authority, and defrauded the New York State Department of Taxation and Finance as well as other legitimate creditors. The Court found that the goal of the enterprise was a "fraud continuing indefinitely." 808 F.2d at 191. It rejected the implausible argument that this indefinitely continuing fraudulent scheme, carried out in numerous episodes of fraudulent activity at different sites, was insufficient to satisfy the pattern requirement, for lack of multiple schemes. It concluded, "we hold that when a person commits at least two acts that have the common purpose of furthering a *continuing criminal enterprise* with which that person is associated, the elements of relatedness and continuity . . . are satisfied." 808 F.2d at 192 (emphasis added).

The concerns discussed in *Ianniello* are a world apart from those at issue here. Of course, a "continuing criminal enterprise" carrying out a continuing scheme of fraud through a broad pattern of predicate acts of fraud at various locations is sufficient to satisfy the requirements of the RICO statute and the *Sedima* footnote without requiring, in addition, a multiplicity of schemes. That conclusion, however, was premised on a finding that there had been a continuing scheme involving multiple instances of skimming funds with respect to several places of business. It in no way supports the plaintiff's proposition that an undertaking to defraud

one customer in the performance of a single finite construction project satisfies the essential elements. This single finite project does not involve the necessary continuity.

And as to the Court's discussion of discrete crimes, as opposed to continuing criminal activity, this is addressed to a completely different point. The point made by the Court is that once the continuing pattern of criminal activity of the enterprise has been shown, it is not necessary that every predicate act used to prove the complicity of individual defendants be of a continuing nature. Continuity is necessary to prove a pattern. But once it is shown that the enterprise has been conducted through a continuing pattern of racketeering activity, each participant whose two or more criminal acts constituted part of that pattern is individually liable. The crimes of each participant need not be of a continuing nature. This does not suggest that continuity of criminal activity is unnecessary to meet the requirement of showing that the *enterprise* was conducted in a pattern of racketeering activity.

It must be understood that *Ianniello* dealt with an enterprise that was defined in terms of continuing criminal objectives. Although the *Ianniello* defendants' actions related to the conduct of lawful business, the "enterprise" found by the court was wholly criminal. The court's statements about the relationship of the predicate acts to that enterprise presuppose its continuing criminal nature. Plaintiff here seeks to apply quotations from that case, out of context, to a lawful enterprise—a construction project. This misapplication produces the false message that two fraudulent acts are sufficient to convert a lawful enterprise into a RICO entity if those acts are "done in the conduct of the affairs of the enterprise." 808 F.2d at 191. This reading is inconsistent with the facts and the holding of *Ianniello*, incompatible with *Teitler* and the Supreme Court's interpretation in *Sedima*, and insensitive to the requirements of the RICO statute.

The Seventh Circuit's language in *Morgan v. Bank of Waukegan*, 804 F.2d 970 (7th Cir.1986), a case cited with approval in *Ianniello*, is instructive. While rejecting any rigid multiple scheme requirement, the court explained that "the mere fact that the complexity of the transaction generates numerous pieces of paper and hence a greater number of possible fraudulent acts does

not make these predicate acts . . . [sufficient to] satisfy the continuity aspect of the pattern of racketeering activity." *Id.* at 976-77. Judge Weinfeld reached a similar conclusion in this district in *Bear Creek Productions v. Saleh*, 643 F.Supp. 489, 495 (S.D.N.Y.1986), in which he held that since "the parties were engaged in a single contract which defined their relative rights and duties" the alleged acts were not "sufficiently unrelated to pose a threat of continuing criminal activity." Unlike *Teitler*, where the enterprise involved the defrauding of numerous insurance companies over an extended period of time, 802 F.2d at 608, or *Ianniello*, in which the defendants were part of an indefinitely continuing broad criminal enterprise, the RICO defendants in this case were engaged in a single lawful project of finite scope and duration—constructing a television studio for a customer. Allegations of numerous instances of fraud in carrying out this project does not bring it within the scope of the RICO statute.

The complaint fails to allege a violation of RICO. There is, accordingly, no basis for federal jurisdiction of this conventional state law fraud action. The complaint is dismissed without prejudice to repleading the fraud claims in an appropriate court.

SO ORDERED.

Appendix C

United States Court of Appeals
For The
Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirty-first day of July, One Thousand Nine Hundred and Eighty-Nine.

Present:

Hon. Richard J. Cardamone

Hon. Ralph K. Winter

Hon. Roger J. Miner

Circuit Judges,

Filed July 31, 1989

The Procter & Gamble Company and
Riverview Productions, Inc.,
Plaintiffs-Appellants,

v.

Big Apple Industrial Buildings, Inc., Arol I. Buntzman, Martin William Halbfinger, Esq., George A. Fuller Company, The Arkhon Corporation, Haines Lundberg Waehler, and John Does 1-10,
Defendants-Appellees.

Docket No. 87-7324

A petition for a rehearing having been filed herein by Appellees Big Apple Industrial Buildings, Inc., Arol I. Buntzman and Martin William Halbfinger, Esq.

Ordered that said petition be and it hereby is DENIED.

Judge Winter dissenting.

Elaine B. Goldsmith,
Clerk
By Kathleen Brown
Deputy Clerk

Appendix D

The Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961, 1962, 1964 (1982 ed. & Supp. V), provides in pertinent part:

§ 1961. Definitions

As used in this chapter—

(1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1029 (relative to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to

engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), sections 2251-2252 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act;

* * *

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

* * *

§ 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities

of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or on assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

* * *

§ 1964. Civil Remedies

* * *

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

* * *

Appendix E

United States District Court
Southern District of New York

The Procter & Gamble Company and
Riverview Productions, Inc.,
Plaintiffs,

against

Big Apple Industrial Buildings, Inc.,
Arol I. Buntzman,
Martin William Halbfinger, Esq.,
George A. Fuller Company, The Arkhon Corporation,
Haines Lundberg Waehler and John Does 1-10,
Defendants.

86 Civ. 3474 (PNL)

COMPLAINT

Plaintiffs The Procter & Gamble Company ("Procter & Gamble") and Riverview Productions, Inc. ("Riverview"), by their attorneys, Kramer, Levin, Kamin & Frankel, for their complaint allege as follows:

Nature of the action

1. This is an action for rescission, arising out of fraudulent and negligent misrepresentations made by certain defendants to plaintiffs as inducement for them to enter into a lease and related agreements in connection with a project known as the Riverview Studio Complex ("the Riverview studios"). Termination of these agreements is prayed for, as well, on the grounds of fraud in the performance of the agreements and material breach of contractual obligations. Plaintiffs also seek to recover (a) treble damages resulting from violations of RICO, 18 U.S.C. § 1962, and from deceit and collusion by an attorney, N.Y. Jud. Law § 487; (b) damages for fraud, breach of contract, breach of warranty; breach of fiduciary duty and negligence; (c) punitive damages; and (d) the cost of this suit and a reasonable attorney's fee under 18 U.S.C. § 1964. Finally, plaintiffs seek injunctive relief, imposi-

tion of a constructive trust and an accounting with respect to certain funds being held in escrow purportedly to pay costs incurred in connection with construction of the leased premises.

2. As will be described in this complaint, various of the defendants have engaged in a pervasive and ongoing course of fraudulent conduct with respect to the Riverview studios since at least 1983. Defendants Arol I. Buntzman and Martin William Halbfinger repeatedly and falsely represented that they and their corporate vehicle, Big Apple Industrial Buildings, Inc. ("Big Apple") possessed sufficient experience and expertise to undertake and successfully complete custom renovation, rehabilitation and construction of "state of the art" television studios and other production facilities suitable for plaintiffs' daytime television serials. Aided by co-defendant George A. Fuller Company ("Fuller"), Big Apple, Buntzman and Halbfinger also misrepresented the cost of such a project, offering as realistic—and even too high—an "estimate" of construction costs which they knew was based upon virtually no information at all. These and other frauds were perpetrated in order to induce plaintiffs to assume rental and other obligations, the effect of which was to obligate plaintiffs to pay the entire construction cost of the Riverview studios and all related expenses no matter how substantial those costs might be.

3. Having fraudulently induced plaintiffs to enter these agreements, defendants then concealed cost estimates that would have indicated to plaintiffs that the true construction cost exceeded what plaintiffs had been told by tens of millions of dollars. By so doing, by continuing affirmatively to mislead plaintiffs as to the actual construction costs, and by other fraudulent and unethical tactics set forth below—including violations of professional responsibility by defendant Halbfinger, an attorney, and false certifications by defendant Fuller and others—defendants succeeded in fraudulently inducing plaintiffs' guarantee of $32 million of construction financing, in fraudulently diverting funds from the construction of the Riverview studios to other parts of Big Apple's project and, in conjunction with other defendants, in charging grossly excessive professional and managerial fees.

4. As a result of these massive and ongoing frauds and the professional incompetence of various of the defendants, the Riverview studios project is in a shambles, with estimated costs to complete construction three or four times what was anticipated, and no reasonable prospect that the studios will be available any time close to the scheduled completion dates. Plaintiffs now must make alternative long-term arrangements to ensure that their television serials will continue to be aired. Because of defendants' wrongful acts, (a) Procter & Gamble may become liable as a guarantor of construction financing in the amount of $32 million; (b) both plaintiffs have incurred tens of millions of dollars in out-of-pocket expenses for equipment and other purchases; (c) plaintiffs face vastly increased costs to produce their television shows at alternative facilities; and (d) substantial additional consequential damages and out-of-pocket damages will be incurred in the future. While the total damage to plaintiffs cannot presently be ascertained, it will undoubtedly be in excess of $100 million.

The parties, jurisdiction and venue

5. Plaintiff Procter & Gamble is an Ohio corporation with its principal place of business in Cincinnati, Ohio. Procter & Gamble is engaged in the business of manufacturing and distributing consumer products, through various subsidiaries, throughout the world.

6. Plaintiff Riverview is a New York corporation with its principal place of business in New York City. Riverview is a wholly owned subsidiary of an advertising agency, D'Arcy Masius Benton & Bowles, Inc. ("Benton & Bowles"), and was formed to act on Procter & Gamble's behalf in connection with the Riverview studios.

7. Upon information and belief, defendant Big Apple is a corporation organized and existing under the laws of New York with a business office at 201 Bronx Terminal Building, 151st Street & Cromwell Avenue, Bronx, New York. Upon information and belief, defendant Buntzman is President and owner of all the capital stock of Big Apple and a resident of New York. Big Apple's principal if not sole asset is the ownership of the real

estate on which the Riverview studios and related projects are being constructed.

8. Upon information and belief, defendant Halbfinger is an attorney admitted to practice in New York, a business associate of defendant Buntzman and an attorney for defendant Big Apple. Upon information and belief, at all times relevant to this complaint, defendant Halbfinger acted on behalf of Big Apple in the conduct of its legal and business affairs.

9. Upon information and belief, defendant Fuller is a corporation organized and existing under the laws of Maryland, with a business office at 919 Third Avenue, New York, New York. Fuller is engaged in the construction business in New York City and elsewhere.

10. Upon information and belief, defendant The Arkhon Corporation ("Arkhon") is a corporation organized and existing under the laws of New Jersey, with a business office at 1800 Chapel Avenue West, Cherry Hill, New Jersey. Arkhon is also engaged in the construction business, acting as a construction manager of building projects.

11. Upon information and belief, defendant Haines Lundberg Waehler ("HLW") is an architectural, engineering and planning firm licensed and registered to do business in New York, with an office at 2 Park Avenue, New York, New York.

12. Defendants John Does 1-10 are persons or entities, presently unknown to plaintiffs, who may be associated with one or more of the other defendants or who may be independent persons or entities and who have participated in, and are liable for, some or all of the wrongful behavior described below. To the extent wrongful behavior of such defendants becomes known to plaintiffs, the identity of those defendants and the acts in which they engaged or participated will be pleaded in an amended complaint.

13. Jurisdiction exists in this Court pursuant to 18 U.S.C. § 1964(a), 28 U.S.C. § 1331 and principles of ancillary and pendent jurisdiction. Venue is present in this district pursuant to 18 U.S.C. § 1965(a) and 28 U.S.C. § 1391(b) and (c).

The background facts

14. Through its subsidiary Procter & Gamble Productions, Inc., plaintiff Procter & Gamble owns four daytime network television serials commonly known as "soap operas." These include three hour long shows, televised each weekday, called *Guiding Light, As the World Turns* (both broadcast on CBS) and *Another World* (shown on NBC). For a number of years, the serials have been filmed and produced at New York City studio facilities owned or leased by the two networks. Two of Procter & Gamble's New York based advertising agencies, Benton & Bowles and Saatchi & Saatchi Compton Worldwide ("Compton"), offer production services, including hiring cast members and other personnel, renting or purchasing needed equipment as well as studios, production facilities and other quarters, and performing any other work associated with the daily production of the shows. Procter & Gamble then reimburses Benton & Bowles and Compton for their expenditures.

15. In 1983, Procter & Gamble began exploring the possibility of moving its daytime shows from the networks' facilities. CBS had indicated its intention to impose a substantial cost increase for use of its studios and other facilities to produce *Guiding Light* and *As the World Turns*. Both network facilities were relatively old, too small and outmoded in numerous other respects. In addition, the CBS and NBC studios lacked storage and office space, forcing Benton & Bowles and Compton (and thus their client, Procter & Gamble) to maintain and pay for space for writers, equipment and other personnel and facilities in seventeen locations throughout the New York metropolitan area, at substantial expense. Because the networks indicated that they could not provide more spacious, economical and up-to-date facilities, Procter & Gamble and Benton & Bowles began to examine potentially suitable alternative sites for production of all three one-hour serials.

16. At least eight sites in the New York metropolitan area were considered. Among these were (a) undeveloped properties (for example, discussions were held concerning a two-story structure in Long Island City whose owners included a number of individuals with extensive prior experience in television and film

production work), as well as (b) working facilities (in particular the "Kaufman Astoria Studios" in Queens, an extensive complex already in operation and with room for expansion and modification).

The initial fraudulent scheme: Buntzman, Big Apple and Halbfinger solicit Procter & Gamble's interest by falsely claiming to possess the experience and expertise necessary to undertake the Riverview studios project, and by misrepresenting project costs

17. Among the options presented to Procter & Gamble and Benton & Bowles was the Washburn Wire Factory, an abandoned wire and cable manufacturing plant located between East 116th and 119th Streets next to the FDR Drive, owned by defendant Big Apple. Big Apple's principal, defendant Buntzman, had approached Procter & Gamble in late 1983, and requested an opportunity to present a proposal for what Buntzman then called the "SCI Manhattan Studio Center." As Buntzman claimed in promotional materials submitted to Benton & Bowles and Procter & Gamble shortly thereafter, the project envisioned a substantial renovation of the Washburn Factory to render it "the only full-service, functionally integrated television and motion picture complex east of California." Part of this planned complex—two television studios—was presented as being available to Procter & Gamble for its daytime television serials.

18. From the outset and throughout the winter and spring of 1984, Buntzman along with his attorney and business associate Halbfinger continued to represent to plaintiffs, as more fully set out below, that Buntzman and Big Apple possessed the experience and expertise to undertake a complex specialty real estate renovation project on the scale and with the technical requirements of the proposed SCI Manhattan Studio Center. Coupled with these representations as to ability were statements as to the cost of the project, designed to make Procter & Gamble and Benton & Bowles believe that the studios could serve as an economically viable alternative for production of the CBS and NBC programs.

19. In fact, as defendants Buntzman, Halbfinger and Big Apple well knew, these representations were false. Defendants'

misrepresentations as to experience and ability, and others relating to construction and other costs which are set out more fully below, were made with the intention and for the purpose of (a) fraudulently inducing Riverview to become a tenant of the as yet unbuilt Manhattan Studio Center; (b) fraudulently inducing Procter & Gamble to guarantee Riverview's rental payments and other obligations under a lease with Big Apple; (c) fraudulently inducing plaintiffs to enter into other agreements which, *inter alia*, enabled Big Apple to obtain $25 million in construction financing on the basis of Procter & Gamble's guarantee of repayment; (d) fraudulently inducing plaintiffs to continue guaranteeing construction loan advances to plaintiffs in excess of $25 million; and (e) enabling defendants Buntzman, Halbfinger and Big Apple, later joined by defendants Fuller and Arkhon, to charge excessive fees in connection with construction and, upon information and belief, fraudulently divert funds from the Riverview studios to other parts of Big Apple's project.

20. In furtherance of defendants' fraudulent schemes, Buntzman sent Benton & Bowles a letter on or about March 20, 1984, purporting to decribe the proposed SCI Manhattan Studio Center. Upon information and belief, in an attempt to misrepresent and exaggerate the degree of planning and consultancy that had been sought in connection with the proposed Studio Center, defendants Buntzman and Big Apple stated in the letter, *inter alia*:

> Our consultants have helped us design the Manhattan Studio Center as the most efficient and productive facility of its kind, combining all elements of production to maximize creative values in a safe, comfortable and readily accessible location. We intend to make our studios and the entire center particularly attractive to you. In that connection we believe that the Video Park Tour will give you an exemplary opportunity to promote your product to an estimate [sic] 2 million visitors a year, coming from foreign countries and all parts of the United States.

21. Shortly thereafter, in or around April 1984, Buntzman sent Benton & Bowles a document entitled "Procter & Gamble Participation in Tour Revenues." This purported to describe the

substantial benefits Procter & Gamble could expect to recoup from the proposed "Star Walk-Video Park Tour." The document asserted:

> Our presentation to Procter & Gamble of the production and entertainment components of the Manhattan Studio Center contained a description of the Star Walk-Video Park Tour, which industry leaders estimate will attract 2 million paying visitors in its first year of operation. Based upon comparisons with other tourist enterprises, it is estimated that the first full year of operation will produce gross revenues of $40-$50 million.

22. In or around April 1984, Buntzman sent Benton & Bowles a document entitled "Riverview Development Team." This document was also designed to misrepresent and exaggerate Buntzman's abilities and experience. It stated, for example, that Buntzman "developed the Bronx Terminal Market into the largest cash-and-carry wholesale shopping center in the world."

23. The statements in these communications were false, and were made with knowledge of their falsity and with the intention of fraudulently inducing Procter & Gamble and Riverview to choose Big Apple's project and forego the other options being considered. Upon information and belief, Buntzman and Big Apple had neither sought the opinion of "industry leaders" nor performed "comparisons with other tourist enterprises." Nor had they designed the "most efficient and productive facility" for the taping of television programs. Moreover, they omitted to disclose that Buntzman's experience with the Bronx Terminal Market, which was cited as evidence of his expertise in large development construction projects, in fact involved minor construction by Buntzman-related entities and was riddled with financial, legal and other problems.

24. The original plans and specifications presented by Big Apple and Buntzman had contemplated two studios. During the negotiations Riverview indicated it would prefer to produce the three shows in three separate studios. Buntzman and Big Apple submitted revised plans and an estimate of the costs of building three studios.

25. On a number of occasions, defendants Buntzman and Big Apple stated that hard construction costs for the three studios would not exceed $18 million and would more likely be in the range of $14 million. For example, as early as April 1984, purporting to inform plaintiffs of the cost of adding a third studio to the Riverview studio project, Buntzman sent Benton & Bowles a document stating that maximum rent for three studios would be $5,950,000 per year. This figure, in turn, was based upon a rent formula proposed by Buntzman (and eventually incorporated in the lease) of a fixed ground rent plus the annual amortization over ten years of a $25 million loan for construction costs, of which $18 million would represent "hard" costs (the costs of construction itself) and the remainder for legal fees, accounting expenses, insurance and other "soft" cost items.

26. Based upon the misinformation supplied to them by Buntzman, plaintiffs were led to believe (a) that the proposed Riverview studios would be "state of the art" studios designed and built to plaintiffs' requirements, providing Proctor & Gamble and Riverview with greater control and flexibility than their arrangement with the networks; and (b) that having all three shows produced at one location, based on an anticipated $18 million construction cost, would be economically advantageous as well. Procter & Gamble and Benton & Bowles thus proceeded to negotiate with Big Apple and Buntzman, incorporating plaintiff Riverview as a wholly owned subsidiary of Benton & Bowles to continue discussions and, in the event a deal was concluded, to be involved in carrying out the project.

The fraud continues: Buntzman, Big Apple and Halbfinger, aided by Fuller, grossly—and fraudulently—understate hard construction costs at $18 million, and lie about the basis for the $18 million estimate, thus inducing plaintiffs to sign and guarantee the Lease

27. So that they could more fully assess the project and the cost estimates provided by defendants, plaintiffs requested that Buntzman prepare a formal analysis and estimate of construction costs. In the summer of 1984, representatives of Procter & Gamble met with Buntzman, Halbfinger and representatives of the proposed general contractor, defendant Fuller. In that meet-

ing, the Procter & Gamble representatives asked how defendants could support their view that (a) hard costs would be in the range of $18 million, and (b) the total cost of the Riverview studios would not exceed $25 million. In response, Buntzman stated, in words or substance, "I've done real estate development in New York. I know that the costs are."

28. In further response to plaintiffs' request for an estimate of project costs, at a meeting held on August 16, 1984, Buntzman made further representations to the effect that the hard costs would not be in excess of $18 million. Buntzman also delivered to plaintiffs a letter mailed by Fuller to Buntzman in which Fuller stated that the project could be built for a maximum price of $18 million.

29. At about the same time, Buntzman gave plaintiffs a one page document in which he included "Maximum Foreseeable Cost Estimates" for the project. These estimates purportedly reflected Buntzman's and Big Apple's analysis of the cost of constructing the three studios, technical and food service facilities, lobby, offices, three floors of dressing rooms, shops, "ready areas" and set and prop storage areas. The "maximum foreseeable" total for all of these items was put at $17,612,000. In this same document, and in a number of conversations with Procter & Gamble and Riverview representatives, Buntzman represented that "Realistic Cost Estimates"—Buntzman's own, allegedly expert view of what costs were in fact likely to be—totalled $13,754,000.

30. In telephone conversations and meetings, Buntzman indicated that the "Maximum" figure was based upon an analysis, undertaken by defendant Fuller, of the existing plans and specifications and intended scope of the project. In fact, as Buntzman then well knew, but failed to disclose to plaintiffs, the so-called Fuller "analysis" was nothing more than the roughest of estimates, based not at all on the plans and specifications. As of August 1984, Fuller had never even seen those plans and specifications. Its $17,612,000 estimate was determined solely by multiplying (a) what Fuller was told would be the approximate square footage of the Riverview project by (b) the average square foot cost incurred by Fuller on a different project it had recently

completed—a project not in any way comparable to a specialty construction project like the Riverview studios.

31. Buntzman and Big Apple and, upon information and belief, Halbfinger concealed this material information from Proctor & Gamble and Riverview, with the intention of fraudulently inducing them to enter into a transaction with Big Apple by which plaintiffs would end up paying the entire cost of constructing the Riverview studios. As these defendants well knew, if plaintiffs had learned the true "basis" of the so-called "Maximum Forseeable Cost Estimates" and the meaninglessness of the supposed "Realistic Cost Estimates," plaintiffs would not have agreed, as in fact they were fraudulently induced to do, to rely on Buntzman, Big Apple or Fuller to develop studios for them without further, more reliable documentation of construction costs, or to sign a lease obligating Riverview to pay (and Proctor & Gamble to guarantee) rental payments based directly on full payment of all construction costs over a ten year period, with no limitation at all.

32. During the latter part of 1984, while negotiations as to the terms of a transaction were proceeding, plaintiffs continued to press for more extensive documentation of the estimated $18 million construction cost. In response, Buntzman and Big Apple (i) continued to represent that the $18 million figure was not only accurate but probably excessive; and (ii) sent plaintiffs additional written materials, on or about August 21, 1984 and September 26, 1984, continuing fraudulently to assert that hard construction costs would not exceed $18 million. When Procter & Gamble and Riverview suggested inclusion of a limitation on costs in the lease, Big Apple, Buntzman and Halbfinger, knowing that Procter & Gamble was anxious to cease its reliance on network facilities and that prompt completion of new studios would be critical once the networks were informed of Procter & Gamble's plans, responded that a cap on costs would mean a delay of many months and implied that such a provision was unnecessary.

33. In January 1985, in reliance on defendants' fraudulent misrepresentations as to experience, expertise and project costs, Riverview entered into a lease with Big Apple, for three as yet to be constructed studios and for a term of ten years ("the Lease"), and Procter & Gamble issued its guarantee of Riverview's rental

and other obligations. The Lease provided for payment of annual rent of (a) a fixed $1.2 million ground rent plus (b) Big Apple's annual debt service including amortization over a ten year period of a loan for the entire construction cost of the project, including professional fees and other costs incurred by Big Apple. In addition to relying on defendants' fraudulent misrepresentations, described above, Procter & Gamble and Riverview were led to believe that Big Apple had an incentive to keep construction costs down because of a provision in the Lease that, if the actual construction cost turned out to be lower than the "Estimated Construction Cost" (a figure to be set by the parties), Big Apple would be entitled to collect half that "savings." In fact, as defendants Big Apple, Buntzman and Halbfinger well knew, the "Construction Cost Savings" clause provided illusory security to plaintiffs, since Big Apple had no intention of negotiating the Estimated Construction Cost in good faith and, indeed, could not do so given its knowledge of the true costs of constructing the Riverview studios.

The scheme to secure financing: defendants Big Apple, Buntzman & Halbfinger assure plaintiffs that Big Apple can obtain financing based only upon the signed Lease guaranteed by Procter & Gamble; they do not deliver on their assurance; and, joined by Fuller, they fraudulently induce Procter & Gamble to guarantee construction financing

34. After execution of the Lease, Big Apple began to search for a construction lender. Demolition and design work continued with Fuller acting as general contractor, and with Procter & Gamble advancing funding for specific purposes, eventually totalling approximately $694,000, on the understanding that these advances would be repaid out of the first proceeds of the construction financing.

35. In negotiations prior to execution of the Lease, Buntzman and Halbfinger repeatedly assured plaintiffs that Big Apple would be able to secure construction financing solely on the basis of the signed Lease coupled with Procter & Gamble's guarantee of rent payments. Procter & Gamble had no obligations to provide, obtain or guarantee construction financing itself. By February, 1985, however, it was obvious that Big Apple was not able to

secure financing based solely on the Lease, and Big Apple requested that Procter & Gamble agree to guarantee a construction loan as well.

36. When, by March 7, 1985, Big Apple still had not received a financing commitment, it sought to blame the lack of a construction loan on Procter & Gamble's refusal to guarantee a loan without receiving a mortgage in return. Big Apple falsely characterized Procter & Gamble's position as a "demand for additional security even though the Obligation of The Procter & Gamble Company is not thereby increased. . . ." In fact, as Big Apple well knew, any guarantee of construction financing would materially increase Procter & Gamble's potential liability, since, until Big Apple could secure financing and complete construction, there was no rental obligation under the Lease. In its letter of March 7, 1985, Big Apple also accused plaintiffs of committing "an act or omission . . . which will or may cause a delay in performance of landlord's obligations" under the Lease. This was intended to establish a basis for collecting so-called "interim rent," which would become due and payable under the Lease even before completion of the premises, in the event of construction delays caused by the tenant.

37. During the time Big Apple was trying to arrange financing, Riverview and Procter & Gamble continued to press for a more precise estimate of construction costs. Big Apple repeatedly stalled plaintiffs with promises that it was working on such an analysis. For example, at a February 4, 1985 meeting, attended by representatives of Procter & Gamble, Riverview, Big Apple, Fuller and the project's architectural engineer, defendant HLW, Big Apple agreed that two estimates of construction cost would be calculated, one by Fuller, with a breakdown by construction trades, and the other by an estimating firm to be retained by the parties. These two estimates were to be prepared, exchanged and analyzed by the estimating firm, HLW, Big Apple and Fuller, by March 25, all of whom would then prepare a joint field control estimate which Procter & Gamble was to receive by April 1. Procter & Gamble was to return this field control estimate, with comments, by April 4. By April 15, an agreed upon "Estimated Construction Cost" was to have been formulated by the parties.

38. In fact, the estimating firm was never retained and—so far as plaintiffs were told at the time—Fuller did not prepare a detailed estimated construction cost. Recently, however, plaintiffs learned that defendant Fuller had in fact prepared an estimate in late March or early April 1985. Fuller's report—which was, upon information and belief, communicated to Buntzman, Big Apple and Halbfinger but was concealed from plaintiffs—was based on the scope of the work described in the Lease and a detailed analysis of each trade, and estimated the cost of construction at $40 million, more than twice what Procter & Gamble had been told.

39. Upon information and belief, Fuller did not divulge this information to Procter & Gamble or Riverview because it was instructed by Buntzman and Halbfinger not to do so. Buntzman and Halbfinger themselves failed to disclose the Fuller report to plaintiffs, although they knew plaintiffs had been pressing for it for months. Buntzman and Halbfinger knew that if Procter & Gamble and Riverview learned of the real costs required to construct the Riverview studios, they would never have permitted the project to continue with Big Apple at the helm or under the Lease terms then in existence, and would never even have considered facilitating construction financing by guaranteeing a construction loan.

40. Instead of disclosing the Fuller estimate—the one document which would have let plaintiffs know the true facts—Big Apple, Buntzman, Halbfinger and Fuller embarked on a plan to deflect Procter & Gamble's demands for accurate cost estimates by hiring a succession of estimators, but then not providing them with information already in defendants' possession concerning the actual costs to be incurred in connection with various trades and not giving them a full picture of what the project entailed. All of this was calculated to ensure that the estimates reached by these firms would be lower than the true cost and not arouse Procter & Gamble's suspicions. Big Apple and Buntzman also continued to make further misrepresentations to Procter & Gamble and Riverview so as to assure them that the cost estimates provided at the time of signing of the lease would not be subtantially exceeded.

41. Thus, although Fuller's estimate (a) had been repeatedly promised and demanded by plaintiffs; (b) was already in Big Apple's possession; and (c) represented the most accurate assessment of the actual construction costs, Big Apple employed the services of Federman Construction Consultants ("Federman"), an outside consulting firm, to prepare an estimate of construction costs at that time. The Federman report was completed on April 9, 1985, but was not made available to plaintiffs until mid-May 1985. It projected hard costs at $22,695,530.

42. When Procter & Gamble engineers attempted a rough extrapolation of the Federman estimate, adding contractor's overhead and other items left out by Federman, they concluded that construction costs might run as high as between $30 and $35 million. Because this was well in excess of what defendants Big Apple, Buntzman, Halbfinger and Fuller had repeatedly indicated would be the maximum possible construction costs, plaintiffs expressed their serious concern to Buntzman. At one or more meetings, Buntzman told Procter & Gamble and Riverview representatives that the Federman report was inaccurate; that the estimate was much too high; and that the report should be disregarded in its entirety. In a subsequent conversation with Richard Bruder, a Procter & Gamble Division Comptroller, Buntzman repeated this assertion, and when asked, in words or substance, whether Big Apple "can bring the project in on or near budget," Buntzman replied, "Yes." At the time, Buntzman knew that the real costs of constructing the studios were well in excess of budget and the Federman estimate. In addition to the Fuller report, Buntzman had seen documentation underlying a fee request made by HLW on May 1, 1985. Those documents, as plaintiffs have recently learned, indicate that the basis for HLW's fee was 10% of estimated hard construction costs, which were placed at $25 to $30 million.

43. A further fraudulent misrepresentation on this subject occurred on or about May 15, 1985, when Riverview entered into a contract with EMJ Consultants, Inc. ("EMJ"), providing for performance of certain construction monitoring services by EMJ. Based on the information that had been provided by defendants, the contract between Riverview and EMJ recited that

"[e]stimated construction hard cost is $20,000,000 [plus or minus]." Knowing full well that hard costs were likely to amount to twice that figure, or approximately $40 million, Buntzman nevertheless acknowledged and signed the contract on behalf of Big Apple, and mailed an executed copy to Riverview.

44. Big Apple desperately needed construction financing. HLW had threatened to cease performing architectural work pending payment of outstanding fees. Further delay might well result in an inability to complete the project on schedule, which would in turn abort the transaction. By their actions in asserting baseless claims of tenant delay, their deception, with defendant Fuller's help, concerning the Fuller estimate, and their continued affirmative misrepresentations concerning the construction cost, defendants Big Apple, Buntzman and Halbfinger were finally able to prevail upon Procter & Gamble to guarantee a construction loan, and to agree to fund construction monies directly if a construction lender failed to do so.

45. The product of defendants' deceit was embodied in an agreement dated June 6, 1985 between Procter & Gamble, Riverview and Big Apple. In this document, known as the Tri-Party Agreement, Procter & Gamble agreed to guarantee $25 million of construction financing provided by Citibank N.A. ("Citibank") for hard and soft costs. The Tri-Party Agreement also committed Procter & Gamble to fund construction monies itself if, despite Big Apple's satisfaction of certain requisition requirements described later in this complaint, Citibank or any other lender failed to do so.

Defendants induce funding of construction beyond $25 million by continuing their deception as to costs

46. Defendants Big Apple, Buntzman and Halbfinger had known all along that $25 million in hard and soft costs would not be nearly enough to complete construction. To induce Procter & Gamble to guarantee even more than the $25 million it had obligated itself to guarantee in the Tri-Party Agreement, these defendants continued to follow the same pattern of deception they had employed from the outset, including the non-disclosure of the $40 million Fuller estimate, the hiring of other estimators to make

projections without providing the appropriate information and the affirmative misleading of Procter & Gamble as to the costs to complete the project.

47. Defendants Big Apple, Buntzman and Halbfinger knew that Procter & Gamble had informed the networks of its plans to move its shows to the Riverview studios and that occupancy of the studios in accordance with the schedule set forth in the Lease, as modified in the Tri-Party Agreement, was critical to plaintiffs. Using that knowledge as leverage, these defendants sought to minimize the need for increased funds and to explain such increases as they would admit had occurred by claiming they were the result of changes made by Procter & Gamble, although they knew construction in accordance with the original plans would cost much more than Procter & Gamble had been led to believe.

48. As part of this scheme, and in response to continued requests by plaintiffs for a current estimate of construction costs, defendants hired a firm called Arthur D. Little Valuations, Inc. ("Little"). On information and belief Little was not given revised plans, Fuller's estimate or any information with respect to the actual cost of various trades, even though this information was already known to defendants. As a result Little's estimate was based on outdated information and guesstimates, rather than facts, and was unrealistically low. But by placating plaintiffs with the fact that the Little estimate was being performed and then by falsely depicting it as realistic, Big Apple, Buntzman and Halbfinger, with Fuller's knowledge and acquiescence, were able to mollify plaintiffs long enough to secure additional guarantees by Procter & Gamble of construction financing that were $7 million more than the $25 million called for in the Tri-Party Agreement.

The pattern of fraud continues and widens: defendants Buntzman, Big Apple, Halbfinger, Fuller and Arkhon implement their scheme to charge excessive fees and fraudulently divert funds

49. With the signing of the Tri-Party Agreement and the beginning of the requisition procedure, a new phase of the fraudulent schemes emerged, one that would enable various of the defendants to obtain grossly excessive professional and managerial fees and spend funds intended only for construction of the

three Riverview studios on other phases of Big Apple's project. As is described below, millions of dollars were improperly requisitioned and paid as a result of the successful implementation of this scheme.

50. Under the Tri-Party Agreement, funds were to be requisitioned from Citibank no more than once a month and advanced to pay actual costs of construction, up to the limit of Procter & Gamble's guarantee of $25 million, upon presentation by Big Apple of, among other things (i) "copies of invoices or statements for actual construction costs to a date not less than two days prior to the date of the monthly requisition"; and (ii) "conditional lien waivers from, and certifications by the persons to which or to whom Actual Construction Costs were incurred . . . that such sums were incurred as part of the Actual Construction Costs" (collectively "the Requisition Requirements"). Beginning with Requisition No. 1 in June 1985 and continuing to and including Requisition No. 11, submitted to Citibank on or about April 8, 1986, defendants Buntzman, Big Apple, Halbfinger, Fuller and Arkhon have defrauded plaintiffs (a) by falsely certifying, purportedly in satisfaction of the Requisition Requirements, that all amounts requisitioned were for construction costs actually incurred; (b) by providing wholly inadequate documentation in support of requisitioned sums; and (c) by requisitioning and receiving payment of excessive and improper charges.

51. Beginning with the very first requisition and on numerous occasions after that time, plaintiffs requested that they be provided complete documentation for requisitioned sums, as required by the Tri-Party Agreement. Again playing on plaintiffs' critical need to occupy the studios on time, defendants Big Apple, Buntzman and Halbfinger "stonewalled" month after month, urging Procter & Gamble not to let paperwork slow down the project and repeatedly promising the documents, but never producing them.

52. Upon information and belief, defendants' refusal to supplement the "back-up" documentation for each requisition was due to the absence of adequate documentation and defendants' fears that their excesses and improprieties would be discovered by plaintiffs. When plaintiffs were finally able to review some of the

documentation, they uncovered a host of improper and excessive charges and confirmed others they had previously suspected. Those of which plaintiffs are presently aware are as follows:

(i) For the period from January 1985 to February 1986, defendant Halbfinger has applied for and been paid the staggering amount of $617,344.25, nearly $50,000 per month, in legal fees. (For March 1986, Halbfinger claims to be owed an additional $56,500, although a requisition has not yet been made.) These fees were purportedly incurred by Big Apple for Halbfinger's services as part of the actual cost of constructing the Riverview studios. Each requisition was supported by nothing more than a cursory bill, with no information as to what work was performed or even how many hours were claimed to have been spent. In response to repeated requests by plaintiffs, since June 1985, for substantiation of these charges, Halbfinger and Buntzman initially made the extraordinary claim that providing such documentation was neither customary nor required; when Halbfinger finally did so, in April 1986, the back-up consisted of nothing more than a summary of the number of hours purportedly spent and his hourly billing rate.

From the sheer number of hours involved—as many as 228 in one month and daily billings from 6 to 15 hours—and the absence of any justification for the charges as construction expenditures, it appears certain that these fees are grossly excessive and in violation of Mr. Halbfinger's obligations under the Code of Professional Responsibility. They have been charged by Mr. Halbfinger, with the knowledge and active cooperation of his clients Big Apple and Buntzman, not because they represented legitimate charges to Big Apple relating construction of the Riverview studios, but because they were ultimately being funded from the pockets of plaintiffs. The purpose and effect of these charges was to deceive and defraud plaintiffs and unjustly enrich Halbfinger.

(ii) Almost as excessive as the fees charged by defendant Halbfinger are his disbursements, which total approximately $40,000 for an average of more than $3,000 per month. A

review of the minimal documentation offered in support of these expenditures, with no explanation as to why they are properly chargeable as actual construction costs, indicates that he has requisitioned sums for office equipment and other perquisites unrelated to the Riverview studios project or at least only partially allocable to it.

(iii) Upon information and belief, Halbfinger sought to profit at plaintiffs' expense in other ways as well. For example, as plaintiffs only recently learned, in June 1985, over the objections of Fuller, Halbfinger demanded that his son be placed on the payroll of the demolition subcontractor and paid at the rate earned by the laborer experienced in the trade although, upon information and belief, he was not so qualified.

(iv) Although defendant Fuller was acting as general contractor and being handsomely paid for its work, Big Apple hired defendant Arkhon to act as a "construction manager." Since the first requisition, a total of $625,000 has been paid to Arkhon in "construction management" fees—including monthly charges in Requisitions Nos. 9, 10 and 11 of $58,576.66, $98,971.96 and $156,545.27. These payments have been supported by conclusory bills indicating that at times more than a dozen Arkhon employees were charging a full day's pay, including four hours of travelling time to and from Arkhon's headquarters in Cherry Hill, New Jersey. Also included were extensive charges, going back to May 17, 1985, for a "Job Procedures Manual" which plaintiffs have never even seen. On information and belief the extent and nature of these payments bear no reasonable relationship to their value to the project, are not customary in the construction business and are grossly excessive.

(v) Included in the requisitions were amounts of at least $3 million for insurance "wrap up" premiums intended to provide insurance coverage for all subcontractors. This sum was charged although subcontractors included in their bid packages additional so-called "insurance costs" in the tens of thousands of dollars, which were requisitioned and have been paid.

(vi) The superstructure concrete subcontract was awarded at $2.24 million in September 1985. By change order in early 1986, the award was raised to $2.95 million, the increase supposedly justified by the extra costs of performing the work in the winter months and by design changes. Just two days later, on January 15, 1986, Fuller authorized a proposed change order raising the cost to $4.75 million, without any explanation or justification whatsoever and, as plaintiffs recently discovered, added the $1.8 million by increasing each line item by exactly the same percentage. This $4.75 million cost was the first figure seen by plaintiffs. When they questioned its legitimacy, the $4.75 million figure was reduced, again on an item by item basis, to the $2.95 million figure (that plaintiffs had not yet seen, although it was reflected in the original documentation).

Moreover, in Requisition No. 19, submitted well after the superstructure concrete total cost had been finally set at $2.95 million, Fuller certified and was paid for 33% of the $4.75 million cost, that is, $585,248 more than the proper amount (33% of $2.95 million). To date, only $419,858 has been credited against this charge.

(vii) A 26.5% mark-up was charged by Fuller on change orders (15% for overhead and 10% of the change order, including overhead for profit). This fee was improper in and of itself. Moreover, the demolition subcontractor, at Fuller's behest, was awarded additional work by change order, rather than by a separate and competitive bidding process. Because of this, Fuller was paid an additional $115,648 with respect to this demolition change order alone. And, when plaintiffs objected, Fuller ceased the practice of charging a 26.5% mark-up, but instead of refunding the $115,648 concealed its existence by including it in a bigger, general category, "Job Organization." To date, the money has not been returned.

(viii) $80,000 was charged for "mobilization" in connection with demolition work performed by a subcontractor. This subcontractor was awarded the work, without competitive bidding, at least in part because, as Big Apple,

Buntzman and Fuller represented to plaintiffs, it was already mobilized on site.

(ix) Approximately $52,000 in "actual pre-construction costs" was certified by and paid to Fuller, although (a) back-up documentation "substantiates" only about $30,000; (b) the balance is accounted for by nothing more than Fuller's "estimate"; and (c) some of the documentation is dated 1983, more than a year before Fuller could possibly have incurred any costs in connection with studios designed for Riverview and Procter & Gamble.

(x) A so-called "compensation payroll" or Christmas bonus of $52,904 was paid to Fuller, representing nearly 20% of payroll costs; this was charged even though fringe benefits already include a 3.8% year-end bonus adjustment, and both sums were charged as project costs rather than being paid out of Fuller's fee, upon information and belief the normal and customary practice in the industry.

(xi) A $37,000 rental fee was charged by Big Apple to Fuller for parking office trailers on the job site, which Fuller billed back to Big Apple, with a 4% fee on top. This resulted in a $39,000 escalation in job cost.

(xii) Insurance brokerage fees in excess of $600,000 were certified and paid to the JLS Group, Inc. When plaintiffs questioned the amount of these fees, they were told the fees covered, in addition to insurance premiums and other charges, extensive "risk managment" services performed by JLS, including all necessary and required safety and security investigations. Nevertheless, more than $100,000 was subsequently charged for a security investigation and safety audit performed by two other firms.

(xiii) Although it is difficult to tell without a complete audit of subcontractor's records, a number of hard cost expenditures appear so excessive as to leave little room for doubt that plaintiffs were charged with work done other than for the Riverview studios project. For example, expenditures for excavation at times were double the normal rate on a per square foot basis; and, in at least one case known to plaintiffs,

Buntzman and Halbfinger instructed Fuller to conceal from plaintiffs the fact that Riverview was being charged for demolition work unrelated to its portion of the project.

(xiv) On one occasion, defendants virtually admitted having charged plaintiffs for work on other portions of the project. After plaintiffs objected to being charged for certain demolition work unrelated to the Riverview studios, Big Apple issued a credit. Incredibly, however, the improper charges were simply "reallocated" to work done for plaintiffs —that is, the cost of demolition work on plaintiffs' part of the project was increased without any basis whatsoever—and the credit was based on the reduced charges now attributed to the other demolition work. This episode resulted in an unjustified cost to plaintiffs of at least $93.000.

(xv) In certain cases, Fuller has certified extra charges for "winter protection" even though such costs were included in the base contract price, as well as premium and overtime charges even where an original contract price was increased to account for exactly such costs. These excessive and improper charges—insofar as they have been uncovered to date—amount to at least $250,000.

53. Upon information and belief, these improper charges represent only the tip of the iceberg. Plaintiffs believe that further investigation and a complete audit will reveal still additional improper and excessive charges amounting to millions of dollars more.

By false certifications and misrepresentations, defendants seek to build a cushion in the event their frauds are discovered

54. In addition to enriching themselves by requisitioning excessive and improper amounts, defendants Big Apple, Buntzman, Halbfinger and Fuller have attempted to protect themselves against the day when Procter & Gamble and Riverview might discover defendants' fraud and turn off the spigot by refusing to guarantee or otherwise permit further advances. This part of the fraudulent scheme was designed to build a cushion by grossly exaggerating and misrepresenting to plaintiffs the extent of

funds required to be held in escrow to allow subcontractors to order certain equipment in advance.

55. The second requisition, dated June 20, 1985, contained an item labelled "Structural Steel (Escrow Account)" in the amount of $800,000. This was accompanied by an invoice from Empire City Iron Works ("Empire City") stating that the escrow funds were being requisitioned "in connection with initial purchase of materials and labor." Also accompanying the requisition, purportedly in satisfaction of the Requisition Requirements, was a certification by Fuller that the advance it sought, including the $800,000 to be placed in escrow, was for "sums incurred as part of the 'Actual Construction Cost' pursuant to the terms of the lease . . . " There was no certification by Empire City.

56. In fact the $800,000 had not been incurred as part of the actual construction cost as defined in the Lease because it was not yet owed to and had not yet been incurred by Empire City and there were no provisions in any of the governing documents for placing sums not yet due into escrow accounts. Accordingly, plaintiffs requested an explanation of the basis upon which $800,000 was requisitioned to be placed in escrow. Defendants Fuller, Big Apple, Halbfinger and Buntzman indicated that, because Empire City—and other subcontractors on the job—did not yet have contracts with Fuller, subcontractors were insisting upon establishment of escrow accounts as assurance of payment, primarily to allow them to order "long lead" items far in advance. In reliance on defendants' representations, plaintiffs permitted payment of the funds requisitioned for placement in escrow, and continued to permit such payments in connection with subsequent requisitions.

57. As each subsequent requisition was made—in every case containing a false certification by Fuller that monies sought for escrow accounts were for costs actually incurred—plaintiffs repeatedly asked to see documentation evidencing (a) that subcontractors had demanded placement of the monies in escrow, (b) that the sums requisitioned were for work within the scope covered by the escrow, and (c) that the sums requisitioned correspond to the amounts assertedly required by the subcontractors. Plaintiffs also asked to see the escrow agreements so they

might determine how the funds were to be disbursed. Defendants Buntzman, Big Apple and Halbfinger repeatedly promised to provide the requested documentation.

58. In December 1985, still not having received the requested documentation, plaintiffs discovered that Halbfinger—who was acting as escrow agent with respect to the escrowed funds, except those relating to Empire City—was not segregating the funds for each trade. At plaintiffs' demand, Halbfinger agreed to establish separate accounts, while continuing to assert that the escrowed funds were only those required for costs incurred by subcontractors still working without a written contract and who needed to order long lead items.

59. Finally, in April of 1986, plaintiffs were provided with what was represented to be all of the existing documentation relating to the escrow accounts. Those documents indicate that, with the possible exception of the Empire City accounts, the representations made by defendants Big Apple, Buntzman, Halbfinger and Fuller with respect to escrows were false. Upon information and belief, some or all of the funds requisitioned for placement in escrow accounts do not represent sums which subcontractors required be placed in escrow for long lead items or similar purposes. Rather, upon information and belief, these escrow monies were requisitioned (a) against the possibility that Riverview and Procter & Gamble would eventually discover the extent of waste and fraudulent diversion of funds by defendants, and (b) in order that defendants would be able, for some period of time, to pay subcontractors for work even after plaintiffs refused to advance or guarantee the advance of funds.

60. The escrow documents provided to defendants also revealed and confirmed the following:

(i) The only written escrow agreement covering all of the funds held by Halbfinger has but two parties, Halbfinger and his client Big Apple. None of the subcontractors who allegedly insisted upon placement of funds in escrow are parties to this agreement. The only condition of payment by Halbfinger is presentation of an invoice from *any* contractor, subcontractor or material-man—including, in theory, defendant and

escrowee Halbfinger himself—with a certification that the sums requisitioned are for actual construction costs.

(ii) On February 7, 1986, withdrawals totalling $4 million were made from two Citibank escrow accounts. On that same day, $4 million was transferred to Chemical Bank "Special Account No. 3, Mr. William Halbfinger and/or Mrs. Andrea S. Halbfinger." Upon information and belief, Andrea S. Halbfinger is defendant Halbfinger's wife.

(iii) The records kept by Halbfinger with respect to escrowed funds are incomplete, haphazard and fail to comply with the requirements the Appellate Division for the First and Second Judicial Departments have imposed on attorneys holding client funds. Contrary to Halbfinger's representation, there were no separate accounts for each of the subcontractors for whom funds were allegedly placed in escrow.

(iv) A payment of $572,013.47 was made to Consolidated Edison—not a subcontractor at all—out of escrowed funds. The purpose of this payment is unknown.

(v) An amount of $1.2 million was escrowed purportedly to cover elevators in September 1985. The contract for elevators, however, was awarded *later*, in November, for $873,000. The escrow was not reduced until February 1986, and then only to $900,000 and only after repeated demands by plaintiffs.

(vi) Upon information and belief, on some occasions Big Apple (i) waited one full week before placing requisitioned funds in escrow, and (ii) withdrew funds from escrow, for payment to subcontractors, a full month before making such payment.

(vii) Despite repeated requests, Big Apple has not set off as a credit in any requisition the amount of interest earned in escrow accounts.

(viii) As described above, defendant Fuller certified that amounts requisitioned into escrow accounts represented actual construction costs. Fuller has now admitted, orally and in a letter of its President William Mango dated April 16,

1986, that, with the exception of funds held for Empire City, it is not a party to or involved in any of these escrow accounts.

(ix) Big Apple was paid $27,651.60 out of escrow, apparently for "retainage." This charge is completely improper, as any retainage would be withheld by Fuller rather than Big Apple, and in any event retainage represents only a bookkeeping notation that a portion of a subcontractor's cost has been withheld, not an actual payment.

61. Millions of dollars remain in escrow accounts under Halbfinger's control, and earning interest at a rate substantially lower than that charged on the construction loan. Moreover, there is a danger, because of the terms of the so-called escrow agreement, that the funds will be disbursed by defendant Halbfinger for purposes other than what was represented to plaintiffs.

62. Since they discovered defendants' misrepresntations and the extent of these irregularities a short time ago, plaintiffs have demanded that no funds be released by Halbfinger from escrow accounts and that no funds be requisitioned by Fuller to be paid from those accounts. Halbfinger has ignored plaintiffs' demands and has continued to disburse funds from the escrow accounts under his control, most recently by payment, on April 29, 1986, of $1.4 million. Fuller first represented, in its April 16 letter, that it would not requisition sums out of escrow accounts held by Halbfinger. One day later, however, in direct contravention of its representation, Fuller paid out $510,000 given to it by Big Apple and Halbfinger which Fuller knew had been held in the Halbfinger escrow accounts.

Yet another fraudulent scheme: recognizing their likely need to blame plaintiffs for construction delays, defendants Buntzman, Big Apple and Halbfinger seek to evade responsibility for landlord's delay, and to collect "interim rent"

63. Fraudulently inducing plaintiffs, milking the project and building a cushion to continue construction in the event of discovery were apparently not enough. Early on, Big Apple, Buntzman and Halbfinger, realizing that Big Apple could not possibly meet the delivery date of the studios provided for in the

Lease, embarked on a scheme to evade responsibility for delay by creating a false record of delay by Riverview. In large measure, as described below, this was accomplished by defendant Halbfinger's overreaching and his direct dealings with a party represented by counsel, in violation of the Code of Professional Responsibility.

64. On July 17, 1985, a "Team Building" luncheon meeting was held among representatives of Procter & Gamble, Riverview and Big Apple, at the Water Club Restaurant in New York City. The principal purpose of the meeting was to discuss the status of construction on the project, and what steps might be necessary to ensure successful and timely completion. Riverview was concerned that a number of modifications of the design by both Riverview and Big Apple, which had been discussed over the previous several months, had not yet been incorporated into the design drawings. This was the result of, among other factors, the focus on obtaining financing; the refusal of the architectural engineers to continue work after March 15, 1985, until they received payment; and Big Apple's insistence that Riverview not deal directly with the architects and others working directly on the job.

65. After the formal Team Building meeting had ended, and everyone else had left, Halbfinger suggested to Philip Dixson, Riverview's President, that the changes Riverview required, which had been known to Big Apple and under discussion for months, could not be incorporated unless Riverview requested Big Apple to hold off construction inconsistent with the pending changes. Aware that Riverview was represented by counsel—and recognizing that the parties had separate and potentially antithetical interests—Halbfinger, in violation of his ethical obligations under the Code of Professional Responsibility, proposed to Dixson that they reduce this understanding to writing. Supposedly to accomplish this "formality," Halbfinger presented Dixson with a letter which Halbfinger had already prepared, on Riverview stationery and, assuring Dixson that it simply effectuated the parties' agreement not to construct those items that were pending change but to proceed with other areas, persuaded Dixson to sign it.

66. The July 17 letter stated, *inter alia:*

> We recognize that the changes requested are extensive. We are concerned that, if work proceeds on the basis of plans and specifications approved by us, while changes are being incorporated into tentative revision plans and specifications, and evaluated, we will be responsible for expenses which may not ultimately benefit our premises.
>
> We therefore direct you to immediately have your architects and The George A. Fuller Company, stop and eliminate all work changes, until further notice by us to you.

67. At the time of the July 17 letter, upon information and belief, Halbfinger and Buntzman knew that construction of the Riverview studios could not be completed pursuant to the agreed upon schedule. Indeed, delay served Halbfinger's and Buntzman's interests, because it presented more opportunity for them to enrich themselves at plaintiffs' expense and because, if blame for delay could be foisted on plaintiffs, it would entitle Big Apple to receipt of "interim rent" potentially amounting to millions of dollars. Upon information and belief, Halbfinger intended the language in the July 17 letter to convey—and intended if the need arose to point to the letter as proof—that Riverview had accepted responsibility for all delays in construction. Halbfinger's actions in tricking Dixson into signing the July 17 letter were in violation of his ethical duties as an attorney and in bad faith and were in furtherance of the fraudulent schemes to which he and his clients and their associates were parties.

68. In further support of their scheme fraudulently to charge Riverview with responsbility for all delays in construction, Buntzman and Halbfinger prepared a second letter, also on Riverview stationery, and persuaded Dixson to sign it as well. Halbfinger told Dixson that this letter, dated August 19, 1985 ("the August 19 letter"), simply confirmed oral agreements reached between Buntzman and Dixson in the previous weeks to create a mechanism for direct communication among, on the one hand, Riverview and Procter & Gamble engineers and other personnel, and, on the other hand, engineers, architects and others

working directly on the project. The August 29 letter, however, went on to say:

> We put your work on hold July 17th because it would be foolish to have you build the studios on the plans, specifications and schedules we had approved, turn them over to us on time, and then have to spend large sums, and much time, to revise and retrofit the work.
>
> To reduce the cumulative delay in performance of landlord's work caused by or resulting from our acts, from July 17th until tentative revision plans and specifications . . . can be completed [and] approved . . . and new bid and award packages are completed [and] approved, we need your consent to direct communication between us, and our agents, and your architects, engineers, consultants, contractors, advisors and representatives, commencing as promptly as possible.

69. Upon information and belief, this language was crafted by Halbfinger and Buntzman in the expectation that they would rely on it, as well as on the July 17, 1985 letter, in support of a claim that Riverview had admitted its responsibility for construction delays. This letter was also presented by Big Apple's attorney, Halbfinger, directly to Dixson for the latter's signature, without advising Riverview's counsel, in violation of the Code of Professional Responsibility.

70. In addition to these letters, and as a further part of his efforts to create a favorable record to support an eventual claim by Big Apple that plaintiffs were responsible for construction delays and cost increases and that Big Apple was entitled to interim rent, Halbfinger arranged to have a court reporter present at various job meetings attended by representatives of Fuller, Big Apple, HLW, Arkhon and plaintiffs. Halbfinger was present at these meetings, but there were no attorneys in attendance representing Riverview or Procter & Gamble. As was the case with respect to the July 17 and August 19 letters, these recorded meetings represented an unethical and fraudulent scheme by Big Apple's attorney, aided by Big Apple and Buntzman, designed to allow Big Apple to evade responsibility for its own fraud and incompetence.

Over and above defendants' fraud, the negligence of Big Apple, Fuller, HLW and others has resulted in substantial engineering, scheduling and other problems, causing damage to plaintiffs in the millions of dollars, and raising serious concerns whether the Riverview project can be completed

71. Upon discovery of defendants' ongoing fraudulent scheme, plaintiffs not only began an investigation into disbursement of funds, but also sought to assess the nature and quality of the work performed to date, and whether the Riverview project can be successfully completed by continuing in its present direction. Based upon plaintiffs' initial review, it appears that substantial design, engineering and construction problems exist and have either been countenanced—as part of defendants' ongoing fraud—or are due to the negligent supervision and construction management of Big Apple, Fuller and Arkhon, or the negligent design, engineering and planning of HLW.

72. The potential defects in design and construction of the Riverview studios of which plaintiffs are presently aware include the following:

(i) Defendants failed to develop a "critical path" schedule, the crucial document in a project of this size, inevitably resulting in delays in construction and cost overruns.

(ii) The project's "exterior envelope" (curtain wall and perimeter interior partitions) may not adequately address acoustic infiltration from surrounding conditions, particularly traffic noise from the FDR Drive and noise from East River boat traffic.

(iii) The project's exterior envelope design may not address potential electro-magnetic interference, especially in the UHF and microwave parts of the spectrum from such sources as East River boat ship-to-shore and radar signals and police traffic radar & cellular communications signals from the FDR Drive, and may not take into account possible interference from elevator machinery.

(iv) The course of construction to date does not evidence coordination of architectural, structural, mechanical and

electrical details. For example, certain duct work fire dampers have already been installed. But the walls which will contain them have not yet been laid out. A strong possibility exists that those walls will not be in line with the already completed work, requiring modification at substantial cost.

(v) So too, the structural steel columns in one of the studios are detailed so that they have to be installed directly against the existing masonry walls. But the walls are not vertical and so the steel cannot be "plumbed up." The design should have included installation tolerance and the contractor should have verified the condition of the existing walls.

(vi) The trusses in other studios were too short and had to be modified by additional structural members, at substantial additional project cost, because existing field conditions were never surveyed.

(vii) The entire switchgear room is at the low-point of the basement; any water infiltration or pipe break will flood the gears.

(viii) The elevator shaft details may not accomodate installation of the saddles, cants, or other required work and will require modification to allow for elevator work to proceed. Even if the installation details were satisfactory, however, the installation sequencing has been so badly mismanaged that occupancy will be substantially delayed.

(ix) No structural loading criteria appear anywhere on the drawings, in contravention of normal engineering practice.

(x) The Halon fire suppression specification does not meet current New York City Code and Fire Department regulations, specifically with respect to time delay activation and multiple station "abort" discharge controllers.

(xi) Heating, ventilation and air conditioning specifications do not define performance criteria or targets. Additionally, the control description in the specifications does not clearly indicate how boilers, cooling coils, heating coils,

dampers and air handling units are to be integrated to control heat, cooling and air flows.

(xii) Specifications for mechanical systems do not spell out who has responsibility for coordination, start-up, balancing and testing. Moreover, it appears that certain aspects of the mechanical systems may not function properly.

73. It has also become apparent that, for all the excessive managerial and expediters' fees, the Riverview studios are way behind schedule, may cost as much as $100 million to build and, in all likelihood, can never be completed under the direction of Big Apple and its entourage. These problems are the result of defendants' fraud, their lack of expertise, their incompetence, their negligence and their overwhelming preoccupation with generating more money for themselves.

The events leading up to this action

74. Beginning in late March of 1986, plaintiffs served notice that they were no longer willing to tolerate defendants' broken promises and procrastination. Through newly retained outside counsel, plaintiffs insisted again that they be given access to documentation with respect to all prior requisitions, the so-called escrow documents and other aspects of the project. It was through a review of those materials, to the extent provided by defendants, and various meetings with representatives of defendants, that plaintiffs became aware of the extent of defendants' fraudulent inducement, their frauds in connection with the performance of the governing agreements and their negligent and incompetent design and management of the Riverview studios project, as pleaded in this complaint.

75. On or about April 8, 1986, in the course of plaintiffs' investigation, Big Apple submitted its Requisition No. 11 to Citibank. Prior to submission of this requisition, plaintiffs had advised Big Apple that they would henceforth insist upon compliance with the Requisition Requirements—that is, invoices supporting the requests for payments, conditional lien waivers from each party to be paid, and certifications that only actual construction costs were being requisitioned.

76. But for Big Apple, Buntzman, Halbfinger and Fuller, Requisition No. 11 was business as usual. No invoices were submitted for hard costs; the only conditional lien waivers and certifications with respect to hard costs were from Fuller; once again Fuller falsely certified that the sum of $1,450,000, requisitioned into escrow, was for actual construction costs; and once again enormous amounts were requisitioned for legal fees and construction management—totalling over $200,000—with little more explanation or back up than a record of hours purportedly worked.

77. Citibank funded the soft cost requests since it already had Procter & Gamble's guarantee as part of the $25 million provided for in the Tri-Party Agreement. The hard cost portion of the loan, however, had been used up and well exceeded, Procter & Gamble having been induced to issue further guarantees as alleged in paragraphs 46-48 above. Procter & Gamble declined to issue further guarantees of such financing and Citibank declined to fund the hard costs included in Requisition No. 11.

78. By notice dated April 15, 1986, purportedly pursuant to the Tri-Party Agreement, defendant Big Apple demanded that Procter & Gamble itself advance the funds requisitioned for hard costs. On April 28, 1986 Procter & Gamble notified Big Apple that its demand would be rejected because its obligation with respect to financing under the Tri-Party Agreement was limited to $25 million, the Requisition Requirements were not met and plaintiffs had determined to pursue their remedies and seek recourse for defendants' fraud.

As and for a First Cause of Action against defendants Buntzman, Big Apple, Halbfinger, Fuller and John Does 1-10
(Fraudulent Inducement and Fraud)

79. Plaintiffs repeat and reallege the allegations contained in paragraphs 1-78 as though fully set forth herein.

80. Defendants Buntzman, Big Apple, Halbfinger, Fuller and John Does 1-10 falsely, fraudulently and with intent to defraud plaintiffs made the representations to plaintiffs described in paragraphs 1-4 and 17-33.

81. Those representations were false and were known to be false at the time they were made, as described in paragraphs 1-4 and 17-33.

82. Plaintiffs reasonably relied on the representations made to them by defendants Buntzman, Big Apple, Halbfinger, Fuller and John Does 1-10 and were thereby induced to enter into the Lease.

83. Having fraudulently induced plaintiffs to enter into the Lease, these defendants engaged in fraudulent acts in their performance of the Lease as described in paragraphs 1-4 and 34-78.

84. Defendants' conduct was willful, wanton, and in intentional disregard of the rights of plaintiffs.

85. Plaintiffs have no adequate remedy at law and have suffered and will continue to suffer irreparable harm and injury as a result of defendants' wrongful acts.

86. By reason of defendants' fraudulent inducement and fraud, the Lease should be rescinded.

87. By reason of defendants' fraudulent inducement and fraud, plaintiffs have suffered damages in an amount to be ascertained at trial, in excess of $100 million.

As and for a Second Cause of Action against defendants Buntzman, Big Apple, Halbfinger, Fuller and John Does 1-10
(Fraudulent Inducement and Fraud)

88. Plaintiffs repeat and reallege the allegations contained in paragraphs 1-78 as though fully set forth herein.

89. Defendants Buntzman, Big Apple, Halbfinger, Fuller and John Does 1-10 falsely, fraudulently and with intent to defraud plaintiffs made the representations to plaintiffs described in paragraphs 34-45.

90. Those representations were false and were known to be false at the time they were made, as described in paragraphs 34-45.

91. Plaintiffs reasonably relied on the representations made to them by defendants Buntzman, Big Apple, Halbfinger, Fuller and John Does 1-10 and were thereby induced to enter into the Tri-Party Agreement.

92. Having fraudulently induced plaintiffs into executing the Tri-Party Agreement, these defendants engaged in fraudulent acts in their performance of the Tri-Party Agreement, as described in paragraphs 46-78.

93. Defendants' conduct was willful, wanton, and in intentional disregard of the rights of plaintiffs.

94. Plaintiffs have no adequate remedy at law and have suffered and will continue to suffer irreparable harm and injury as a result of defendants' wrongful acts.

95. By reason of defendants' fraudulent inducement and fraud, the Tri-Party Agreement should be rescinded.

96. By reason of defendants' fraudulent inducement and fraud, plaintiffs have suffered damages in an amount to be ascertained at trial, in excess of $100 million.

As and for a Third Cause of Action against defendants Buntzman, Big Apple, Halbfinger, Fuller and John Does 1-10
(Fraudulent Inducement and Fraud)

97. Plaintiffs repeat and reallege the allegations contained in paragraphs 1-78 as though fully set forth herein.

98. Defendants Buntzman, Big Apple, Halbfinger, Fuller and John Does 1-10 falsely, fraudently and with intent to defraud plaintiffs made the representations to plaintiffs described in paragraphs 46-48.

99. Those representations were false and were known to be false at the time they were made, as described in paragraphs 46-48.

100. Plaintiffs reasonably relied on the representations made to them by defendants Buntzman, Big Apple, Halbfinger, Fuller

and John Does 1-10 and were thereby induced to guarantee construction loan advances in excess of $25 million.

101. Defendants' conduct was willful, wanton, and in intentional disregard of the rights of plaintiffs.

102. Plaintiffs have no adequate remedy at law and have suffered and will continue to suffer irreparable harm and injury as a result of defendants' wrongful acts.

103. Some of the loan proceeds above $25 million are in escrow accounts controlled by defendants Big Apple and Halbfinger, the latter as escrow agent. By reason of defendants' fraudulent inducement and fraud as more fully set forth in paragraphs 46-78 below, defendants Halbfinger and Big Apple, and any of their agents or persons acting in concert with them, should be enjoined from transferring or alienating any of the fraudulently obtained funds which are currently in escrow. In addition, the court should order defendants to return to Citibank all construction loan advances in excess of $25 million as a partial reduction of the construction loan.

104. By reason of defendants' fraudulent inducement and fraud, plaintiffs have suffered damages in an amount to be ascertained at trial, in excess of $100 million.

As and for a Fourth Cause of Action against defendants Buntzman, Big Apple, Halbfinger, Fuller and John Does 1-10
(Negligent Inducement)

105. Plaintiffs repeat and reallege the allegations contained in paragraphs 1-78 as though fully set forth herein.

106. Defendants Buntzman, Big Apple, Halbfinger, Fuller and John Does 1-10 knew or should have known that the representations made by them to plaintiffs, as described in paragraphs 1-4 and 17-22, were false when made, and that plaintiffs would rely upon those representations.

107. Plaintiffs repeat the allegations of paragraphs 82 and 85 as though fully set forth herein.

108. By reason of defendants' negligent inducement, the Lease should be rescinded.

As and for a Fifth Cause of Action against defendants Buntzman, Big Apple, Halbfinger, Fuller and John Does 1-10
(Negligent Inducement)

109. Plaintiffs repeat and reallege the allegations contained in paragraphs 1-78 as though fully set forth herein.

110. Defendants Buntzman, Big Apple, Halbfinger, Fuller and John Does 1-10 knew or should have known that the representations made by them to plaintiffs, as described in paragraphs 34-45, were false when made, and that plaintiffs would rely on those representations.

111. Plaintiffs repeat the allegations of paragraphs 91 and 94 as though fully set forth herein.

112. By reason of defendants' negligent inducement, the Tri-Party Agreement should be rescinded.

As and for a Sixth Cause of Action against defendants Buntzman, Big Apple, Halbfinger, Fuller and John Does 1-10
(Negligent Inducement)

113. Plaintiffs repeat and reallege the allegations contained in paragraphs 1-78 as though fully set forth herein.

114. Defendants Buntzman, Big Apple, Halbfinger, Fuller and John Does 1-10 knew or should have known that the representations made by them to plaintiffs, as described in paragraphs 46-48, were false when made, and that plaintiffs would rely on those representations.

115. Plaintiffs repeat the allegations of paragraphs 100 and 102 as though fully set forth herein.

116. Some of the loan proceeds above $25 million are in escrow accounts controlled by defendants Big Apple and Halbfinger. By reason of defendants' negligent inducement as more fully set forth in paragraphs 46-48 below, defendants Halbfinger

and Big Apple, and any of their agents or persons acting in concert with them, should be enjoined from transferring or alienating any of the fraudulently obtained funds currently in escrow. In addition, the Court should order defendants to return to Citibank all construction loan advances in excess of $25 million as a partial reduction of the construction loan.

As and for a Seventh Cause of Action against defendants Big Apple, Buntzman, Halbfinger, Fuller and John Does 1-10
(RICO)

117. Plaintiffs repeat and reallege the allegations contained in paragraphs 1-78 as though fully set forth herein.

118. At all times relevant to this complaint, defendants Buntzman and Halbfinger together constituted an "enterprise" as defined in 18 U.S.C. § 1961(4), that is, a group of individuals associated in fact. The purposes of the enterprise included, without limitation (a) fraudulently inducing plaintiffs to undertake the Riverview studios project and to choose Big Apple as developer and landlord from among a number of alternatives available to plaintiffs; (b) fraudulently inducing plaintiffs to guarantee construction financing and to make loan advances itself if a construction lender failed to do so; (c) charging excessive fees in connection with the project; (d) upon information and belief, fraudulently diverting funds from the project; (e) attempting to build a cushion in the event their frauds were discovered by making false representations with respect to the need for escrow accounts and falsely certifying that escrowed funds were for actual construction costs; and (f) evading responsibility for delays properly attributable to landlord with the fraudulent intention of collecting interim rent.

119. At all times relevant to the complaint, the enterprise described herein was engaged in and its activities affected interstate and foreign commerce.

120. At all times relevant to this complaint, defendants Big Apple, Buntzman, Halbfinger, Fuller and John Does 1-10 were associated with the enterprise described in paragraph 118.

121. At all times relevant to this complaint, defendants Big Apple, Buntzman, Halbfinger, Fuller and John Does 1-10 did conduct and participate, directly and indirectly, in the conduct of the affairs of the enterprise described in paragraph 118, through a pattern of racketeering activity, including the multiple ongoing fraudulent schemes as described in paragraphs 1-4 and 17-78.

122. At all times relevant to this complaint, defendants Big Apple, Buntzman, Halbfinger, Fuller and John Does 1-10 did acquire and maintain, directly and indirectly, an interest in and control over the enterprise described in paragraph 118, through a pattern of racketeering activity as described in paragraphs 1-4, 17-78 and 124-25.

123. At all times relevant to this complaint, (a) in acquiring and maintaining an interest in and control over the enterprise, and conspiring to do so, and (b) in conducting and participating in the affairs of the enterprise, and conspiring to do so, defendants Big Apple, Buntzman, Halbfinger, Fuller and John Does 1-10 performed or aided and abetted the performance of two or more indictable acts under the federal mail and wire fraud statutes, 18 U.S.C. ¶¶ 2, 1341 and 1343, including those particularized in paragraphs 1-4 and 17-78 and including, among others, the mailing and transmission between defendants and plaintiffs of the following matters, things, writings, signs and signals over and through the interstate and foreign mails and wires, with the intention to defraud plaintiffs and in furtherance of defendants' schemes to defraud;

(a) documentary and oral representations that defendants Buntzman, Halbfinger and Big Apple possessed the requisite experience and expertise to successfully develop the Riverview project;

(b) documentary and oral misrepresentations as to construction costs;

(c) false and excessive invoices;

(d) false and excessive certifications.

124. At all times relevant to this complaint, (a) in acquiring and maintaining an interest in and control over the enterprise, and

conspiring to do so, and (b) in conducting and participating in the affairs of the enterprise, and conspiring to do so, defendants Big Apple, Halbfinger, Fuller and John Does 1-10 performed two or more indictable acts under New York Penal Law § 155.35 ("Grand larceny in the second degree"); § 175.10 ("Falsifying business records in the first degree"); and § 190.65 ("Scheme to defraud in the first degree"), all with the intention of defrauding plaintiffs and in furtherance of defendants' schemes to defraud, and including the submission of false and excessive invoices and certifications, as more fully particularized above.

125. By reason of the above described violations of 18 U.S.C. § 1962(b), (c) and (d), plaintiffs have been, and continue to be, injured in their business and property in an amount to be ascertained at trial, in excess of $100 million, to be trebled pursuant to 18 U.S.C. § 1964(c).

As and for an Eighth Cause of Action against defendant Big Apple (Breach of Contract)

126. Plaintiffs repeat and reallege the allegations contained in paragraphs 1-78 as though fully set forth herein.

127. Plaintiffs, for valuable consideration, entered into agreements with defendant Big Apple, including the Lease and the Tri-Party Agreement.

128. Defendant Big Apple was obligated to perform under all of these agreements, and to exercise good faith to incur only reasonable costs in the construction of the Riverview studios.

129. Defendant Big Apple has completely failed to perform its obligations under the agreements.

130. Defendants' conduct has been willful, wanton and in intentional disregard of the rights of plaintiffs.

131. Plaintiffs have no adequate remedy at law and have suffered and will continue to suffer irreparable harm and injury as a result of defendant's wrongful acts.

132. By reason of defendant's material breaches, the Lease and Tri-Party Agreement should be rescinded.

133. As a result of defendant's material breaches, plaintiffs have been damaged in an amount to be ascertained at trial, in excess of $100 million.

As and for a Ninth Cause of Action against defendants Fuller, Arkhon, Haines Lundberg Waehler and John Does 1-10
(Breach of Third Party Beneficiary Contracts)

134. Plaintiffs repeat and reallege the allegations contained in paragraphs 1-78 as though fully set forth herein.

135. Plaintiffs are third party beneficiaries, with the knowledge and consent of Arkhon, Fuller, Big Apple and Haines Lundberg Waehler, of agreements (a) between Arkhon and Big Apple; (b) between Fuller and Big Apple; (c) between Haines Lundberg Waehler and Big Apple; and (d) between John Does 1-10 and Big Apple. Pursuant to these agreements, Arkhon was to provide construction management services, Haines Lundberg Waehler was to provide architectural, engineering and planning services, Fuller was to act as general contractor and John Does 1-10 were to provide other services in connection with the project.

136. Pursuant to these agreements, defendants Fuller, Arkhon, Haines Lundberg Waehler and John Does 1-10 were obligated to perform their respective services in a workmanlike, professional and competent manner, and to exercise good faith to incur only reasonable costs.

137. Defendants have completely failed to perform their obligations under the agreements.

138. Defendants' conduct has been willful, wanton and in intentional disregard of the rights of plaintiffs.

139. As a result of defendants' material breaches, plaintiffs have been damaged in an amount to be ascertained at trial, in excess of $100 million.

As and for a Tenth Cause of Action against defendants Big Apple, Fuller, Arkhon, Haines Lundberg Waehler and John Does 1-10 (Negligence)

140. Plaintiffs repeat and reallege the allegations contained in paragraphs 1-78 as though fully set forth herein.

141. Defendants Big Apple, Fuller and Arkhon undertook to perform construction supervision and management services for the benefit of plaintiffs in connection with the Riverview studios project.

142. Defendant Haines Lundberg Waehler undertook to provide architectural, engineering and planning services for the benefit of plaintiffs in connection with the Riverview studios project.

143. Defendants John Does 1-10 undertook to perform other services for the benefit of plaintiffs in connection with the Riverview studios project.

144. In providing the above described services, defendants were duty bound to exercise reasonable care, which they have failed to do as set forth in paragraphs 1-4 and 17-78 above, to the detriment and damage of plaintiffs.

145. As a result of defendants' negligence, plaintiffs have been damaged in an amount to be ascertained at trial, in excess of $100 million.

As and for an Eleventh Cause of Action against defendants Big Apple, Fuller, Arkhon, Haines Lundberg Waehler and John Does 1-10 (Breach of Implied Warranty)

146. Plaintiffs repeat and reallege the allegations of paragraphs 1-78 as though fully set forth herein.

147. In undertaking to perform services in connection with the Riverview studios project and for the benefit of plaintiffs as described in paragraphs 141-44 above, defendants Big Apple, Fuller, Arkhon, Haines Lundberg Waehler and John Does 1-10 impliedly warrantied that they were competent to and would

perform those services at a level of ability ordinarily possessed by those in defendants' professions.

148. Defendants Big Apple, Fuller, Arkhon, Haines Lundberg Waehler and John Does 1-10 have breached the implied warranty described in paragraph 147 above. Defendants' conduct has been willful, wanton and in intentional disregard of the rights of plaintiffs.

149. As a result of defendants' breaches of their implied warranties, plaintiffs have been damaged in an amount to be ascertained at trial, in excess of $100 million.

As and for a Twelfth Cause of Action against defendant Halbfinger (N.Y. Judiciary Law § 487)

150. Plaintiffs repeat and reallege the allegations of paragraphs 1-78 of the complaint as though fully set forth herein.

151. Defendant Halbfinger's fraudulent and wrongful behavior, as described above and including without limitation (i) participating and acquiescing in fraudulent representations; (ii) charging patently excessive and unreasonable legal fees; (iii) establishing so-called escrow "accounts" without legal basis and maintaining those accounts under an escrow agreement with his own client which permits disbursement of funds in a fashion not authorized by the governing documents; (iv) failing to keep required records with respect to escrowed funds; (v) engaging in direct dealings with a represented, potentially adverse party without the knowledge or consent of that party's attorney; and (vi) violating the Code of Professional Responsibility in these and other ways, was for the purpose and had the effect of deceiving plaintiffs and fraudulently inducing them to enter into certain agreements and to refrain from exercising their rights, all in violation of Section 487 of the N.Y. Judiciary Law and plaintiffs' rights.

152. As a result of defendant Halbfinger's fraudulent and deceitful acts plaintiffs have been damaged in an amount to be ascertained at trial, in excess of $100 million, which should be trebled pursuant to section 487 of the Judiciary Law.

As and for a Thirteenth Cause of Action against defendant Halbfinger (Breach of Fiduciary Duty and Fraud)

153. Plaintiffs repeat and reallege the allegations of paragraphs 1-78 as though fully set forth herein.

154. To date, defendants have fraudulently requisitioned in excess of $10 million for placement in escrow, in the manner described in paragraphs 54-62. Millions of dollars remain in escrow in accounts of defendant Halbfinger, who has ignored demands by plaintiffs that the funds be returned to Citibank to reduce the balance of the construction loan and that no disbursement of escrow funds be made.

155. As escrow agent, defendant Halbfinger stands in a fiduciary relationship to plaintiffs, as the parties liable for payment of the escrowed funds, and for whose benefit the subcontractors' work is to be performed. As a result of defendants' fraud, in which defendant Halbfinger participated, defendant Halbfinger has breached his fiduciary duty to plaintiffs with respect to the escrowed funds.

156. Upon information and belief, if not immediately restrained and enjoined, defendant Halbfinger will continue to engage in fraud and will disburse funds presently held in escrow, with the actual intent and effect of wrongfully and without lawful authorization disbursing monies that belong to plaintiffs.

157. Plaintiffs have no adequate remedy at law and have suffered and will continue to suffer irreparable harm and injury as a result of defendant's wrongful acts.

158. By reason of the foregoing, defendants Halbfinger, his agents and any persons acting in concert with him should be enjoined from transferring or alienating any of the funds currently in escrow. In addition, the Court should impose a constructive trust upon the funds currently in escrow, and require approval by the Court of any payments from escrow supposedly for actual construction costs and pursuant to prior agreement with subcontractors.

159. As a result of defendant Halbfinger's breach of fiduciary duty and fraud, plaintiffs have been damaged in an amount to be ascertained at trial, in excess of $10 million.

As and for a Fourteenth Cause of Action against defendants Halbfinger and Big Apple and John Does 1-10 (Breach of Third Party Beneficiary Contract)

160. Plaintiffs repeat and reallege the allegations contained in paragraphs 1-78 as though fully set forth herein.

161. Plaintiffs are third party beneficiaries, with the knowledge and consent of Big Apple, Halbfinger and any other parties thereto, of any escrow agreements purportedly establishing escrow accounts for payment of subcontractors in connection with the Riverview studios project.

162. Plaintiffs repeat and reallege the allegations of paragraphs 154-57 above as if fully set forth herein.

163. If defendant Halbfinger is permitted to disburse funds from escrow for new work and materials, such disbursement will be in violation of plaintiffs' rights as third party beneficiaries under the contracts as described in paragraphs 161-62 above.

164. By reason of the foregoing, defendants Halbfinger and Big Apple, and their agents and any persons acting in concert with them, should be enjoined from transferring or alienating any of the funds currently in escrow. In addition, the Court should impose a constructive trust upon the funds currently in escrow, and require approval by the Court of any payments from escrow supposedly for actual construction costs and pursuant to prior agreement with subcontractors.

165. As a result of defendants' breaches of contract, plaintiffs have been damaged in an amount to be ascertained at trial, in excess of $10 million.

As and for a Fifteenth Cause of Action against defendants Big Apple, Buntzman, Halbfinger, Fuller, Arkhon and John Does 1-10 (Conversion)

166. Plaintiffs repeat and reallege the allegations contained in paragraphs 1-78 as though fully set forth herein.

167. As a result of the acts described above, including without limitation defendants' charging of excessive fees, submission of false certifications, fraudulent diversion of funds, and improper placement of monies into so-called "escrow accounts", defendants are converting and stealing property and money that belongs to plaintiffs. Defendants wrongfully continue to exercise dominion over plaintiffs' property and money in contravention of plaintiffs' ownership rights.

168. Defendants' conduct has been willful, wanton and in intentional disregard of the rights of plaintiffs.

169. As a result of this converison, plaintiffs have been damaged in an amount to be ascertained at trial, in excess of $100 million.

As and for a Sixteenth Cause of Action against defendant Big Apple (For a Declaration of Rights)

170. Plaintiffs repeat and reallege the allegations of paragraphs 1-78 as though fully set forth herein.

171. Purportedly pursuant to the Tri-Party Agreement, defendant Big Apple has sent a notice to plaintiffs, demanding that plaintiffs "advance . . . the sum set forth in . . . Requisition No. 11".

172. In fact, pursuant to the terms of the Tri-Party Agreement, plaintiffs have no obligation to advance the sums set forth in Requisition No. 11.

173. Defendant's conduct was willful, wanton and in intentional disregard of the rights of plaintiffs.

174. Plaintiffs have no adequate remedy at law, and have suffered and will continue to suffer irreparable harm and injury as a result of defendant's wrongful acts.

175. Plaintiffs demand judgment against the defendants as follows:

(a) On plaintiffs' First through Third Causes of Action, (i) declaring that the Lease and the Tri-Party Agreement are null and void and of no effect; (ii) preliminarily enjoining defendants Halbfinger and Big Apple and their agents or persons acting in concert with them from transferring or alienating any of the funds currently in escrow; (iii) requiring defendants to return to Citibank all construction loan advances in excess of $25 million in reduction of the outstanding balance of the construction loan; and (iv) awarding plaintiffs their damages resulting from defendants' fraudulent inducement of the Lease, the Tri-Party Agreement, and advances of construction financing in excess of $25 million, and from defendants' fraudulent acts, in an amount to be ascertained at trial, but in no event less than $100 million;

(b) On plaintiffs' Fourth through Sixth Causes of Action, (i) declaring that the Lease and the Tri-Party Agreement are null and void and of no effect; (ii) preliminarily enjoining defendants Halbfinger and Big Apple (and any of their agents or persons acting in concert with them) from transferring or alienating any of the funds currently in escrow; and (iii) requiring defendants to return to Citibank all construction loan advances in excess of $25 million in reduction of the outstanding balance of the construction loan;

(c) On plaintiffs' Seventh Cause of Action, awarding them compensatory damages in an amount to be ascertained at trial, but in no event less than $100 million, trebled pursuant to 18 U.S.C. § 1964(c);

(d) On plaintiffs' Eighth Cause of Action, (i) declaring that the Lease and Tri-Party Agreement are null and void and of no effect; and (ii) awarding plaintiffs their damages resulting from defendant's material contractual breaches, in

an amount to be ascertained at trial, but in no event less than $100 million;

(e) On plaintiffs' Ninth Cause of Action, awarding plaintiffs their damages resulting from defendants' material contract breaches, in an amount to be ascertained at trial, but in no event less than $100 million;

(f) On plaintiffs' Tenth Cause of Action, awarding plaintiffs their damages resulting from defendants' negligence, in an amount to be ascertained at trial but in no event less than $100 million;

(g) On plaintiffs' Eleventh Cause of Action, awarding plaintiffs their damages resulting from defendants' material breaches of implied warranties, in an amount to be ascertained at trial, but in no event less than $100 million;

(h) On plaintiffs' Twelfth Cause of Action, awarding plaintiffs their damages resulting from defendant's deceit and fraud in violation of N.Y. Jud. Law § 487, in an amount to be ascertained at trial, but in no event less than $100 million, trebled pursuant to § 487;

(i) On plaintiffs' Thirteenth and Fourteenth Causes of Action, (i) preliminarily and permanently enjoining defendants Halbfinger and Big Apple (and any of their agents or persons acting in concert with them) from transferring or alienating any of the funds currently in escrow; (ii) imposing a constructive trust on the funds currently in escrow and requiring approval by the Court of any payments from escrow to subcontractors; and (iii) awarding plaintiffs their damages resulting from defendants' breach of fiduciary duty and third party beneficiary contracts in an amount to be ascertained at trial, but in no event less than $10 million;

(j) On plaintiffs' Fifteenth Cause of Action, awarding plaintiffs their damages resulting from defendants' conversion of plaintiffs' money and property, in an amount to be ascertained at trial, but in no event less than $100 million;

(k) On plaintiffs' Sixteenth Cause of Action, declaring that plaintiffs have no obligation, under the relevant docu-

ments or otherwise, to pay funds requisitioned in Requisition No. 11, or to guarantee repayment of any advance of such funds, in excess of $25 million;

(l) Awarding plaintiffs punitive damages in an amount to be ascertained at trial, but in no event less than an additional $100 million;

(m) Ordering appointment of a receiver or other person to (i) take an accounting of defendants' disposition and use of all funds advanced to them in connection with the Riverview project; and (ii) transfer to plaintiffs the money and property presently in escrow;

(n) Awarding plaintiffs such other relief as may be just or proper under the circumstances, together with costs, disbursements and a reasonable attorney's fee pursuant to 18 U.S.C. § 1964(c).

Dated: New York, New York
May 2, 1986

Kramer, Levin, Nessen, Kamin
& Frankel

By: /s/
Harold P. Weinberger

Attorneys for Plaintiffs
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Appendix F

United States District Court
Southern District of New York

The Proctor & Gamble Company and
Riverview Productions, Inc.
Plaintiffs

-against-

Big Apple Industrial Buildings, Inc.,
Arol I. Buntzman, et al
Defendants

JUDGMENT

Defendants having moved to dismiss on the grounds that the complaint fails to plead a valid RICO claim, and the said motion having come before the Honorable Pierre N. Leval, U.S.D.J., and the Court thereafter on March 13, 1987, having handed down its opinion and order (#60680), that the complaint fails to allege a violation of RICO, and that there is, accordingly, no basis for federal jurisdiction of this conventional state law fraud action; dismissing the complaint without prejudice to repleading the fraud claims in an appropriate court, it is,

ORDERED, ADJUGED AND DECREED: That the complaint be and it is hereby dismissed without prejudice to repleading the fraud claims in an appropriate court.

DATED: NEW YORK, N.Y.
March 20, 1987

Raymond F. Burghardt
Clerk

THIS DOCUMENT WAS ENTERED ON THE DOCKET
ON MARCH 23, 1987.